

No. 22272

In the

United States Court of Appeals
For the Ninth Circuit

KAISER STEEL CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Judgment of the United States District Court
for the Northern District of California.

Brief for Appellant

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A. JURISDICTIONAL STATEMENT

This is an action against the United States for a refund of Federal income taxes. Jurisdiction is based on Section 1346(a)(1), Title 28, U.S. Code. (Para. 1, Pre-Trial Order, R. 28).

B. STATEMENT OF THE CASE

This is an action by Kaiser Steel Corporation (hereafter called "Kaiser") for a refund of Federal corporation income taxes. During the period involved Kaiser filed its tax returns on a fiscal year basis, and the tax years in question are the fiscal years ending June 30, 1949 and June 30, 1950.

The case turns upon the proper "representative market price" to be used in computing depletion with respect to coking coal mined by Kaiser from properties at Sunnyside, Utah, and iron ore mined by Kaiser from its mines in California. This coking coal and iron ore was used by Kaiser at its steel mill in Fontana, California, and no relevant sales were made of it by Kaiser.

A large volume of factual data was put into evidence at the trial. By and large the essential facts are uncontested. Therefore, it will not be necessary for the Court to weigh conflicting evidence. However, the parties differ sharply as to the inferences and conclusions, both factual and legal, to be drawn from the underlying undisputed data.

At the close of the trial the District Court, in addition to requesting briefs from each party, asked each party to submit at the same time its proposed findings of fact and conclusions of law. The findings and conclusions proposed by Kaiser appear at pages 85 to 118, inclusive, of the Transcript of Record¹ while the findings and conclusions proposed by the defendant United States (hereafter called the "Government") appear at pages 119 to 144, inclusive. The District Court adopted as its findings and conclusions (R. 31-55), the findings and conclusions proposed by the Government virtually in verbatim form.

No written or oral opinion was prepared by the District Court. The judgment as entered simply holds that Kaiser is entitled to take nothing. (Record, p. 56).

Kaiser then filed motions to amend the findings of fact, to make additional findings of fact, to alter or amend judg-

1. For brevity the Clerk's Transcript of Record (one volume) will hereafter be referred to as the "Record" or "R.", while the reporter's transcript of the trial proceedings (ten volumes) will be referred to as the "Transcript" or "Tr.".

ment and for a new trial. (Record, pp. 57-80). These motions and the memorandum in support thereof clearly set forth the significant errors in the findings, conclusions and judgment. The Court simply denied these motions without opinion. (Record, p. 82). Consequently, in the preparation of this appeal, it has been necessary for Kaiser to approach the problem *de novo* since we have no guidance from any opinion or decision of the Trial Court.

No help is afforded in trying to understand the basic rationale of the decision by the conclusions of law. On the contrary, many of the principles enunciated by those conclusions undermine the findings of fact and decision of the Court. For example, in Conclusion of Law No. 6 (R. 52), it is stated that, "Physical, chemical or geological differences have importance only if they are recognized in commercial competition." The evidence is uncontroverted that differences of percentage of ash content in coking coal are specifically recognized in commercial competition and price adjustments are made on account thereof. The decision in determining a representative market price pays no attention to this express commercial practice and its effect on price. In Conclusion of Law No. 7 (R. 52), the Court states that a representative market price "is provable only by actual sales transactions entered into between buyer and seller after arm's-length negotiations." The evidence shows that none of the sales of coking coal by Utah Fuel Company (which the Court used in part for the purpose of establishing a representative market price for Kaiser's coals) were the result of any *arm's-length* negotiations between buyer and seller—rather they were the result of distressed economic conditions which forced Utah Fuel Company to make these sales at whatever price it could get if it was to keep this particular mine open. Conclusion

of Law No. 7 (R. 53) states further that "prices paid by buyers in unrelated geographical markets . . . have no bearing" in determining a representative market price. The evidence shows that all of the Utah Construction Company sales of iron ore (used by the Court to establish a representative market price for Kaiser's iron ore), other than the sales made to Kaiser Steel and the sales made for export at Long Beach, were in a geographical market unrelated to Kaiser's California iron ore mines.

Kaiser is an integrated manufacturer of iron and steel products. Its principal manufacturing facilities are located near Fontana in San Bernardino County, California. For use in its steel making process Kaiser produces coke by processing coking coal through coking ovens. This coke, together with iron ore and other materials, is charged into a blast furnace from which iron is obtained. (Finding² No. 12, R. 33). In making this coke Kaiser used coal it mined from properties located near Sunnyside, Utah, together with some purchased coal. (Finding No. 13, R. 33).

The iron ore used by Kaiser in its blast furnaces was mined by Kaiser in the first year from its Vulcan mine in San Bernardino County, California, and in both years from its Eagle Mountain mine in Riverside County, California. Also some iron ore was purchased for the reasons and under the circumstances hereafter described. (Finding No. 14, R. 33-34).

The iron ore produced by Kaiser was not sold by it but was wholly consumed and utilized in its own operations. The same thing is true as to coking coal which it mined (except to a minor and irrelevant extent).

2. Findings of the District Court are referred to simply as "Finding".

Under the applicable Internal Revenue Code,³ Kaiser is entitled to a deduction for depletion of these minerals computed as a percentage of the "gross income from mining". The statute does not define gross income from mining. The treasury regulations⁴ in effect at the time in question provide that if the taxpayer sells the mineral product in the immediate vicinity of the mine "gross income" means the amount for which such product was sold, but if the product is processed before sale (as was the case here) "gross income" means the "representative market or field price (as of the date of sale) of a mineral product of like kind and grade".

Since, as previously indicated, no relevant sales of Kaiser's mineral products were made, a "representative market or field price" for such products must be determined in order to compute the proper depletion deduction. That determination is the issue of this case.

1. Iron Ore

A principal ingredient used by all iron and steel companies in a blast furnace is iron ore. The product produced from the blast furnace is pig iron. The principal factor used in comparing and pricing iron ores is the amount of iron contained in the ore (the so-called Fe content). Other factors are the amount of Sulphur (S), Phosphorous (P), Silica (SiO_2) and the moisture content of the ore, i.e., whether it is wet or dry. (Finding No. 23, R. 37). Iron ore becomes more valuable as the iron (Fe) content increases. (Finding No. 24, R. 38). Sulphur and phosphorous are deleterious and must be removed from the ore by various means. (Finding No. 25, R. 38). Ore used in blast furnaces

3. Section 114(b)(4), 1939 I.R.C., Appendix B hereto.

4. Regs. 111, Sec. 29.23(m)-1, Appendix C hereto.

must be crushed and screened to size and must not have too many "fines". (Finding No. 29, R. 39).

Steel companies also use open-hearth grade ore in their open-hearth furnaces. This ore has special characteristics to adapt it to that use. It must be in a lump form in order to sink through the molten bath in the open-hearth. It must be hard dense ore approximately 1½ or 2 inches to 10 inches in size, with high iron and low sulphur and phosphorous content. (Powell, Tr. 733-735). This type of ore is not the commodity which is involved in this case. We are concerned only with blast furnace grade ore.

During the time involved there were only four *producers* of blast furnace grade iron ore in the Western United States—Columbia Iron Mining Company, Colorado Fuel and Iron Corporation, Utah Construction Company, and Kaiser. The only *consumers* of blast furnace grade iron ore in the western United States were Colorado Fuel and Iron Corporation, Geneva Steel Company and Kaiser. (Admissions of Fact, No. 2, R. 23). There were no published prices for iron ore in the western United States. (Admissions of Fact, No. 1, R. 23).

Colorado Fuel and Iron Corporation produced all of its blast furnace grade iron ore from its own mines in Utah and Wyoming and made no sales of such ore. (Exhibit 34, p. 15, lines 10-25). Geneva Steel Company acquired its iron ore (except for a single emergency purchase to be discussed later) from Columbia Iron Mining Company, which produced for and sold ore to no other person or entity. Both Columbia Iron Mining Company and Geneva Steel Company were wholly-owned subsidiaries of United States Steel Corporation. (Exhibit 35, p. 21, lines 1-6). Ore was transferred between the two subsidiary companies at a price which was determined without reference to what the ore might have been purchased for from independent sources.

(Exhibit 35, p. 24, lines 8-15). The record contains no evidence of any transfer price used by either Colorado Fuel and Iron Corporation or Geneva Steel Company for these inter-company transfers.

Kaiser produced its blast furnace ore from its Eagle Mountain and Vulcan mines and procured some blast furnace and open hearth ore under contract with Utah Construction Company. The amounts (in net tons of 2,000 lbs.) were as follows (Findings 15 and 21, R. 34 and 36).

	Year ending 6/30/49	Year ending 6/30/50
Eagle Mountain Mine (owned).....	276,655	835,215
Vulcan Mine (owned).....	167,970	—
Utah Construction Co. (Blast Furance and Open Hearth)	146,501	228,924

Utah Construction Company was in the construction business. In 1941 it obtained a contract to mine iron ore for Colorado Fuel and Iron Corporation from iron mines owned by that corporation in Utah. It was paid on the basis of a price per ton for mining and a price per yard for stripping. (Christensen, Tr. 489, line 7 to 490, line 8). In 1944, an individual named Senter Walker, who held some iron ore deposits in Utah, entered into a similar mining contract with Utah Construction Company for it to perform similar operations on his property. (Christensen, Tr. 490, lines 14-21; Tr. 493, line 17 to 494, line 9). In 1946, operating difficulties developed with Walker which threatened to close down his mine. Since Utah Construction Company had by this time built up an investment in its construction mining equipment, and was interested in continuing the mining contract from which it had been deriving a satisfactory profit from a contractor's point of view, it took over Walker's operation. (Christensen, Tr. 496, lines 1-14).

Kaiser procured iron ore from the Utah source, first under contract with Walker and later under contract with Utah Construction. These were interim contracts intended to continue only until such time as Kaiser's Eagle Mountain property would become fully operative. (Admissions of Fact No. 7, R. 24). All parties were aware that purchases by Kaiser were diminishing and that when Kaiser's Eagle Mountain facility went into operation, there would be no further purchases of blast furnace grade iron ore by it from Utah sources. The Eagle Mountain mine went into full production in 1950 and purchases of blast furnace grade ore from Utah ceased. (Christensen, Tr. 530; Powell, Tr. 732-3). Utah was fully aware that Kaiser would nevertheless continue to purchase open-hearth grade ore for use in its open-hearth grade furnaces from some source and it was interested in preserving this market. The former president of Utah Construction Company, who was a witness at the trial, testified without contradiction that because of these factors the contract price to Kaiser was set in 1946 when Utah took over by simply continuing the previous price in the Walker contract *without regard to the value of the ore* but merely to recover operating costs and investment plus the contractor's profit which it had been making on its mining and stripping operations. (Christensen, Tr. 499, line 20; Tr. 502, lines 13-17; Tr. 507, lines 10-19).

The total iron ore sales of Utah Construction Company for the years in question, including the ore produced under the contract with Kaiser, appear in Finding No. 22 (R. 36-37). The only sales involving any material tonnage of blast furnace grade ore, other than those to Kaiser or one of its affiliated companies, were certain sales for export to Japan at Long Beach, California and a sale to Geneva Steel

Company in 1950. The sale to Geneva Steel Company which arose out of temporary operational difficulties at the Geneva Steel facility (Admissions of Fact No. 4, R. 23), was a stock pile of fine and soft ore which had been accumulated as a residue from other sales of regular grade ore. The price at which this transaction took place reflected these facts. (Christensen, Tr. 531, line 6 to 532, line 5). The export to Japan was the first and only shipment of iron ore to the Japanese from the United States during the period 1939 to 1950. The price reflected the controlled situation of the Japanese economy during the immediate post-war period.

On the basis of the foregoing evidence, which was essentially undisputed, the District Court concluded that the "representative" price to be established at Kaiser's mines in California for the ore which Kaiser mined and used was the same as a mine price at the Utah Construction Company mine in Utah. It was computed on a weighted average of *all* the Utah Construction Company transactions and developed a price of \$2.29 for 1949 and \$2.03 for 1950 (Finding 35, R. 41).

The uncontested evidence shows, however, that these Utah transactions are not of the kind or character which can establish a "representative market or field price," because they arose out of and were subject to special reasons and circumstances and did not truly reflect a "representative" market or "market price" as between independent producers and consumers of iron ore. Therefore, it is necessary to look elsewhere for a "representative market or field price of [iron ore] of a like kind or grade." The only place in the United States where a free exchange of transactions in iron ore regularly takes place is at the Lower Great Lakes Ports, and reported prices for these

transactions are available from standard reference sources. (Exhibit SS). Prices established at this market are used in the West for valuing ore. The evidence established that the iron ore produced by Kaiser was at least the equivalent in quality of Mesabi non-Bessemer ore sold in that market. (Pardee, Tr. 583, line 18 to 584, line 13). Therefore, Kaiser contends that the representative market or field price for ore it mined should be on the same basis as the Lower Lake Port ore, making appropriate adjustment for the Fe content. (The ore price thus determined is to be a price at Kaiser's Fontana mill which is the market. This price would be reduced by the freight from Kaiser's mines to Fontana in order to determine the price at Kaiser's mines.)

Expert economic testimony (again without contradiction in any significant respect) demonstrated that Lower Lake Ports were not an unrelated market. There was a sizeable movement of iron and steel products into Kaiser's markets in the western United States from iron and steel producers in the eastern United States. There was competition in these products between eastern producers and Kaiser. (Howard, Tr. 829, lines 1-7). The price for finished steel products produced in the East has a direct relationship to the Lower Lake Port price for iron ore which is used in their manufacture. (Exhibits 7 and 8). Since the finished products were in competition and therefore the prices of the finished products were interrelated, and since the prices of eastern finished products are related to eastern ore prices, a price for Kaiser's western ore can be reliably developed from the prices for western finished products. The price as so developed substantiates the soundness of the position that the price for Mesabi non-Bessemer ore at the Lower Lake Ports is "a representative market or field price for a mineral product of like kind and grade" which should

be used to establish a price for Kaiser's ore for depletion purposes. As shown by Appendix F attached, the proper representative market prices should be \$4.159 and \$4.472 for 1949 and \$5.132 for 1950 instead of the \$2.29 and \$2.03 found by the Court.

Even assuming, arguendo, that ore sales by Utah Construction Company would be a starting point for determining the price for Kaiser's iron ore for depletion purposes, the District Court made two gross errors in fixing a market price, which are extremely prejudicial. *First*, it improperly used sales of Utah Construction Company which in any view are not representative transactions. The District Court, as an example, considered as "representative" and used the very large spot sale to Geneva Steel of low grade "fine" ore which is clearly a different mineral product and was sold under distress conditions. *Second*, the District Court in fixing a price gave no consideration to the effect on price of substantial freight differentials which arise by reason of the fact that the Kaiser mines are closer to the only relevant market than those of Utah Construction Company. The Court equated the Utah Construction Company mine price *at its Utah mine* with the Kaiser mine price at Kaiser's California mines. The only market in which Kaiser ore could have competed were the sales to Kaiser itself and the sales by Utah Construction Company for export to Japan. In each instance the Kaiser mine was much closer to the point where the sale transaction (i.e., Kaiser's plant at Fontana, California, or the point of shipment to Japan at Long Beach, California) occurred and the representative market price was established, so that the mine price (sale price less freight to point of sale) at Kaiser's mine would in all events exceed the price at the Utah mine. *Third*, it was only the price established by the

export sale which had any of the indicia of being the "result of competitive conditions" as opposed to the "peculiar economic conditions" existing in connection with all of the other sales by Utah Construction Company.

The effect of these errors on the "representative market price" determined by the Court is extremely significant. Using the export sales the representative market price at the Kaiser mine should properly have been \$5.25, \$5.90 and \$4.66 for each of these respective shipments, as compared with \$2.29 and \$2.03 "representative price" set forth in Finding 35 (R. 41).

2. Coking Coal

The other important ingredient used in producing iron in a blast furnace is metallurgical coke. In making coke, Kaiser used high volatile coal it mined from properties in Utah together with low volatile coal that it purchased from Oklahoma and Arkansas. The coal mining properties were located at Sunnyside, Utah. (Finding No. 13, R. 33).

In comparing coking coals from different sources, a number of factors are considered. These include the amount of fixed carbon, volatile matter (gases), sulphur and ash that are contained in the coal, and the plasticity of the coal. (Finding No. 53, R. 45).

The most important factor in coking coal is its fixed carbon. It is the fixed carbon in the coal that iron manufacturers are purchasing when they buy coking coal for it provides the fuel in the blast furnace. (Finding No. 54, R. 45). The testimony is uncontradicted that the market price always reflects differing fixed carbon contents. As the carbon content increases the price increases.

Ash is the term used in the coking coal industry to describe the undesirable physical elements in coal [other

than volatile matter, sulphur, and phosphorous]. Ash in the form of "free impurity" (rock or shale) may be removed by washing the coal before it is processed into coke. Ash not so removed and the "inherent ash" must be removed in the blast furnace. Both of these processes increase a manufacturer's cost of production. (Finding No. 58, R. 46). As the ash in coal purchased increases, the amount of fixed carbon decreases. The testimony is uncontradicted that the market price is always adjusted for and reflects differing ash contents and that these prices have varied from 10¢ to 40¢ per point of ash per ton.

Plasticity is a distinguishing characteristic of coking coal. When coking coal is processed in a coke oven, one of its constituent parts, vitrain, tends to melt and become a viscous liquid as the coal is heated. As the coke cools, the vitrain hardens to form a binder for the fixed carbon in the coke. Plasticity gives the coke physical strength so that it does not pulverize or break down in the blast furnace. (Finding No. 67, R. 49). The testimony is uncontradicted that this characteristic is not reflected in prices for different coking coals.

High volatile coking coal (having a relatively high portion of volatile matter) when used alone produces a coke that is physically weak and has the undesirable tendency of pulverizing in a blast furnace. (Finding No. 60, R. 46-47). Low volatile coking coal (having a relatively low portion of volatile matter) cannot be used alone because it tends to swell and damage the ovens. (Finding No. 61, R. 47). Therefore, the uniform practice of western steel producers in making coke was to blend coking coals of various volatility to arrive at a coke with optimum strength at the most economical cost. All of the western steel producers purchased substantial tonnages of low volatile coking coal

from mines in the Arkansas-Oklahoma region of the United States. (Finding No. 62, R. 47).

The coking coal mined by Kaiser came from a mine near Sunnyside, Utah, known as the Sunnyside No. 2 Mine, which Kaiser leased from Utah Fuel Company in 1942 and purchased in early 1950 (Finding No. 48, R. 44). The production by Kaiser for its own use during the period in question (in net tons of 2,000 lbs.) was as follows:

Fiscal year ended June 30, 1949—416,615
Fiscal year ended June 30, 1950—591,568

(Finding No. 36, R. 41). In addition, Kaiser disposed of nominal and irrelevant amounts of Sunnyside coal for non-coking purposes. 25,260 net tons was sold in the fiscal year ending June 30, 1949, and 28,340 net tons in the fiscal year ending June 30, 1950.⁵ (Finding No. 41, R. 42-43).

All of these coal sales by Kaiser were transfers at cost or accommodations arising out of some special circumstance. Transfers to Geneva Steel Company resulted from the fact that its mine was adjacent to Kaiser's mine and the companies made accommodation transfers of coal for testing and assisted each other in the event of labor stoppages. (Admissions of Fact No. 23, 24 and 25, R. 25-26). The transactions with Utah Fuel Company and its customers were made partly as an accommodation to Utah Fuel, Kaiser's lessor, and partly to balance the fact that both companies used the same washer and it was not always feasible to allocate the washed coal precisely. (Heers, Tr.

5. Transfers of coal between Kaiser and Kaiser-Frazer, a related entity, were disregarded by the District Court as not being sales because they were made at cost, and are disregarded here. (Finding No. 41, R. 42). No reason is given by the District Court as to why other sales also made at cost to Columbia Geneva Steel, Permanente Metals (a related entity) and Denver & Rio Grande Western Railway are included in its computation of price.

110, lines 3-7; Tr. 116, lines 18-21; Heiner, Tr. 335, line 20 to 336, line 8). The other transactions were mainly "sales" to railroads arising out of cars lost in transit. (Heers, Tr. 97, lines 14-17).

Utah Fuel Company, Kaiser's lessor, owned and operated mines producing coal of a non-coking quality. It also owned a mine known as Sunnyside No. 1, which was adjacent to Sunnyside No. 2 and produced coal of the same coking quality as Sunnyside No. 2. To the extent it could find buyers, it made sales of the coal from Sunnyside No. 1 for domestic and commercial uses only, in the tax years in question (Heiner, Tr. 328-330). This coal was not desirable or salable for the domestic or commercial trade and all such sales were made on a distress basis (Heiner, Tr. 341, lines 22-24). This was because the coking characteristics of the coal were entirely undesirable for commercial or domestic use. This mine had been operated at a loss since 1929 (Heiner, Tr. 331, lines 8-11). The operation was, however, continued even though on a losing basis in the hope that the property would eventually fit into the expansion of the western steel industry and its market for coking coal (Heiner, Tr. 373, lines 19-22).

During the time in question one producer of iron and steel in the western United States, Colorado Fuel and Iron Corporation, did purchase a substantial volume of its high volatile coking coal on the open market. (Finding No. 64, R. 47). Most of this coal was acquired from St. Louis, Rocky Mountain & Pacific Company of Raton, New Mexico, sometimes called "Raton Coal Co.". (Finding No. 65, R. 48). In addition, all the iron and steel producers purchased substantial tonnages of low volatile coking coal from the mines in the Arkansas-Oklahoma region for coking purposes. (Finding No. 62, R. 47).

In determining a "representative" market price for the coking coal mined by Kaiser, the District Court looked only to the distress sales by Utah Fuel Company for non-coking purposes plus the minor volume of special circumstance sales by Kaiser. The District Court said that the sales by Raton Coal Co. to Colorado Fuel and Iron Corporation "confirm" the sale prices obtained by Utah Fuel Company. (Finding No. 71, R. 50). However, the District Court did not, in fact, utilize these prices in finding the price for Kaiser's coal despite the fact that the Court also found that the Raton Mesa coal and the Sunnyside coal "competed directly in the market place . . ." (Finding No. 70, R. 49).

The sales by Kaiser and by Utah cannot be used to find a representative market price. They were made at or less than cost, under distress conditions and not in any competitive market. The open market sales in substantial volume by Raton Coal Co. to Colorado Fuel and Iron Corporation of coking coal either alone or in conjunction with the substantial sales of Oklahoma-Arkansas coking coal to the iron and steel producers (which latter sales were also totally ignored by the District Court) should have been used as the basis for determining the price of coking coal mined by Kaiser. In determining a representative market price from the Raton sales, adjustments must also be made for the lower ash characteristics of Kaiser's coal⁶ since the uncontradicted testimony established that these factors are always considered in pricing coal and "recognized in commercial competition". (Heers, Tr. 87, line 25; Keenan, Tr. 267, line 11; and see Finding No. 58, R. 46).

6. Compare the ash of 7.1% and 6.8% in Kaiser's coking coal (Finding No. 59, R. 46) with the 11.8% and 12.3% in the Raton Coal Co. coal sold to Colorado Fuel and Iron Corporation. (Finding No. 66, R. 49).

C. SPECIFICATION OF ERRORS

The principal errors relied upon by Kaiser are, *with respect to iron ore*, (1) The failure of the District Court to find that there was a market for iron ore at the Lower Great Lake Ports in the United States during the tax years in issue at which a representative market price was established applicable to iron ore produced in the western United States and in failing to consider or utilize such price in determining a representative market or field price for the iron ore mined by Kaiser. (2) The District Court's finding that transfers and dispositions of and the mine prices received by Utah Construction Company for iron ore transferred or disposed of by it established a representative market or field price for iron ore mined by Kaiser. (3) The District Court's failure to find that, if transfers or dispositions of iron ore by Utah Construction Company are to be used to establish a representative market or field price for iron ore, only the prices received for export sales to Japan should be considered for such purpose. (4) The District Court's failure to find that, if transfers or dispositions of iron ore by Utah Construction Company are to be used to establish a representative market or field price for iron ore, freight differentials between the point of sale or consumption and the point of production must be taken into account in determining representative market or field prices for iron ore at Kaiser's mine.

With respect to coking coal, the District Court erred (1) In finding that transfers or dispositions of and the amounts received by Utah Fuel Company for Sunnyside No. 1 coal established a representative market or field price for Kaiser's coking coal. (2) In finding that transfers and dispositions of and the amounts received by Kaiser for Sunnyside No. 2 coal established a representative market or field

price for Kaiser's coking coal. (3) In failing to use sales of Raton Coal Co. coal for coking purposes, as adjusted for washing costs and ash content, in determining a representative market or field price for Kaiser's coking coal. (4) In failing to use sales of Oklahoma-Arkansas coking coal in determining a representative market or field price for Kaiser's coking coal. (5) In failing to consider, when establishing a representative market or field price for Kaiser's coking coal, recognized price adjustments made in the market for ash content and washing loss. (6) In finding that the element of plasticity is or should be given any consideration in the determination of a representative market or field price.

D. ARGUMENT

The fundamental problem both with respect to coking coal and with respect to iron ore is to find the "representative market price" to be used in computing Kaiser's "gross income from mining". When this is determined the computation of the deduction for depletion amounts to nothing more than the application of a mathematical percentage to the gross income figure. The difficulty arises because Kaiser as an integrated producer utilizes its mining production in making a final product. The mineral products are not sold in the open market. It is therefore necessary, according to the regulations, to determine a "representative market or field price of a mineral product of like kind and grade". The prices to be used must be for materials of like kind and grade and these prices must be "representative". In the view of the Supreme Court this representative price should be one which the mineral product would command if the taxpayer's mining operations were conducted as a separate and independent business entity. *U. S. v. Cannelton Sewer Pipe Co.*, 364 U.S. 76 (1960).

This leads to the basic difference in approach in this case. The position argued by the Government, and seemingly adopted in toto by the District Court, is that any price, at any time, and under any circumstances is sufficient to establish a "representative market price". The mere fact that the transaction occurred at all seems to make the price realized "representative" of the "market" in which that transaction occurred.

Kaiser believes that such an approach is contrary to the intent of the law and regulations and is completely unrealistic. We say that in determining the hypothetical price at which the mineral produced would have been sold by an independent miner to an independent steel producer, consideration must be given to all other transactions in the mineral products involved. This consideration must however include an examination of all the facts and circumstances surrounding the transactions under consideration to determine if the prices established in such transactions are, in fact, truly "representative" of the prices which would obtain in an arm's length sale between an independent miner and an independent manufacturer. If, as here, the evidence indicates that special circumstances or factors affected the reliability of the transactions, then appropriate corrective adjustments must be made or the transactions must be discarded entirely and other reliable evidence of representative market prices must be located.

Under the regulations the search is for a representative market or field price. Representative market price is a question of fact. *Ames v. U. S.*, 330 F.2d 770, 773 (9th Cir. 1964). Since the question is one of fact, all of the facts surrounding a price arrived at in a particular transaction must be examined to determine if that price is representative. The rule is not that *any* price is to be used, but that only repre-

sentative prices are used. As the Court observed in *U. S. v. Henderson Clay Products*, 324 F.2d 7 (5th Cir. 1963), at page 15:

"The Regulation does not allow the indiscriminate use of any price of a product of like kind and grade, but requires the price to be representative; 'representative' should be interpreted to qualify the entire phrase 'market or field price'."

The facts of a particular transaction may indicate that the transaction is not a representative one, and the prices used in that transaction thus must be excluded from consideration. That is all Kaiser has said in this case.

For example, in the leading case of *U. S. v. Cannelton Sewer Pipe Co.*, supra, the Court found that certain sales of ground and bagged fire clay and shale were too negligible to furnish an appropriate basis for computing depletion. (364 U.S. at 78, fn. 2).

Other cases have recognized that the facts surrounding some sales may make them not representative. In *Carey Salt Company v. U. S.*, 667 CCH Para. 8157 (Ct.Cls. 1966) the issue was the determination of depletion on certain of the taxpayer's rock salt deposits. The taxpayer, in order to discourage two of its competitors from mining rock salt, and because these competitors sold the taxpayer evaporated salt when its demand temporarily exceeded its supply, sold rock salt to the two competitors at a lower price than would have been commanded from ordinary customers. These competitors, in turn, sold the rock salt on the open market in competition with the taxpayer. The Commissioner included these sales of rock salt to competitors in his computation of the average price per ton of rock salt sold during the tax period involved. The Court of Claims held that the Commissioner's approach was erroneous. It noted that the

taxpayer sold rock salt to its competitors at a substantially lower price than could be obtained on the open market, and the competitors then sold the same rock salt to ordinary customers who otherwise might have purchased rock salt from the taxpayer. The competitors could afford the taxpayer's price for rock salt only because it was lower than the market price. The Court observed that constructive income is an attempt to simulate the sales income of a non-integrated miner and concluded that a non-integrated miner would in all probability sell the additional products of his mine on the open market. It held that the Commissioner was in error when he included the special prices obtained from the competitors in the computation of the taxpayer's constructive net income. Here then is a clear recognition of the principle that not every sale which is made is necessarily a representative sale and a demonstration of one type of special economic factor which requires a particular sale to be excluded from consideration.

Another case of similar import is *Gray Knox Marble Company v. U. S.*, 257 F.Supp. 632 (E.D. Tenn. 1966). That case involved the depletion on marble blocks used by the taxpayer in its plant to manufacture finished products. The taxpayer contended that the sales of quarry blocks by it to others, or if not by it to others, then sales by its competitors to others, established a representative market or field price which should be used for depletion. The Government contended that the sales of quarry blocks made by the taxpayer or the other miners were in such small quantities, under the circumstances existing in the case, that they were not truly representative of the value of the marble which the taxpayer processed and sold in manufactured form. The Government also claimed that the sales of marble blocks were marketable at premium prices because job specifications were set by architects for the kind of marble to be

used, and that this put the taxpayer and the other miners in a monopolistic position and enabled them to sell blocks at premium prices. The Court upheld the Government's contention, that the prices at which the marble blocks were sold were not representative prices. Again, we have an example of a Court examining the facts of certain transactions and eliminating such transactions from consideration for the reason that they were not "representative" transactions. In the *Gray Knox* case it so happened that the elimination served the advantage of the Government. The principle, of course, is the same—in determining whether a transaction takes place at a representative price, all of the facts of that transaction must be considered.

If any further proof on this point is required, we need merely look to the regulations which the Commissioner himself proposed on July 13, 1966. 31 F.R. 9506.⁷ These proposed regulations state:

"Sales of ores or minerals of like kind and grade as the taxpayer's will be taken into consideration in determining the representative market or field price for the taxpayer's ore or mineral *only if such sales are the result of competitive transactions*. For the purpose of determining the representative market or field price for the taxpayer's ore or mineral, *exceptional, nominal, unusual, tie-in, or accommodation sales shall be disregarded.*" (31 F.R. 9508). (Emphasis added.)

One fact which can be of relevance in determining whether a sale is a "representative" sale is the fact of intended use. A good example of this appeared in *North Carolina Granite Corp.*, 43 T.C. 149 (1964). The taxpayer there extracted a certain type of granite which was particularly well suited for feeding to poultry as grit. When sold

7. Appendix E hereto.

for poultry grit, the granite commanded a price of from \$8 to \$10 per ton. The granite also was suitable for use as road building material, but sales for that purpose brought only \$1 to \$1.50 per ton. The Commissioner contended that the price to be realized from sales for road building purposes governed for depletion purposes, but this argument was rejected. The Court said that the average prices at which the taxpayer "sold its crushed granite in bulk to road builders were not *representative* of the value of the product to the poultry industry". (43 T.C. at 161, italics added). The Tax Court held that the poultry grit price was to be applied in determining depletion of the material sold for that use.

There are three cases referred to in the District Court's conclusions of law which deal with percentage depletion as applied to coking coal and iron ore. All of these cases arose in the United States District Court for the Northern District of Alabama. One decision was affirmed on appeal by the Court of Appeals for the Fifth Circuit. All were decided by District Judge Seybourn H. Lynne and, except for the narrow point upon which one decision was affirmed by the Court of Appeals, the cases represent the views of a single Federal District Judge. Between the decesion of the first case in the series and the last, even this one Court had occasion to change its opinion as to some of the matters in issue. Be this as it may, there is nothing in any of these cases which is inconsistent with the position adopted by Kaiser in this case.

The first case was *Alabama By-Products Corp. v. Patterson*, 151 F.Supp. 641 (N.D. Ala. 1957). The taxpayer in that case produced a high grade of foundry coke from high quality coking coal which it mined and used in its operation. The taxpayer contended that there was no represent-

ative market or field price for the type of coking coal which it produced, since this coal was of such high quality and had such desirable properties that it was not of "like kind and grade" as any other coal. Since there was, therefore, no representative market or field price for any coal of like kind and grade as this taxpayer's coal, the taxpayer argued that it was entitled to use the "proportionate profits" method of calculating depletion for income tax purposes.

District Judge Lynne rejected this argument and held that all bituminous coal mined in the Birmingham district was of "like kind" and that all bituminous coal having coking properties was of "like grade". Since it appeared there were significant *sales and purchases* in the open market in the Birmingham district by the taxpayer and others of coal used for *coking purposes*, the District Court held that these should be used to ascertain a representative market or field price for such coal. The Court found it unnecessary to determine, and did not determine, what such representative market or field price was. No evidence was introduced nor did the Court make any findings concerning recognized adjustments in price for washing costs, washing losses, fixed carbon or ash content. The taxpayer had rested its entire case upon the proposition that it was entitled to use the proportionate profits method because there was no representative market or field price. Having failed to establish the necessary predicate for use of the proportionate profits method, the taxpayer was afforded no recovery at all.

This holding of Judge Lynne was affirmed upon appeal to the Fifth Circuit Court of Appeals. 258 F.2d 892 (1958), *cert. den.* 358 U.S. 930. The Court of Appeals agreed that all bituminous coal mined and marketed in the Birmingham area having coking properties for commercial usage was

coal of "like kind and grade" to the taxpayer's coal. Since there was evidence of extensive sales of coking coal for coking purposes in the Birmingham area, the Court of Appeals affirmed the finding that the taxpayer had failed to prove the absence of a representative market or field price for coking coal. The Court of Appeals said that because a coking coal could not meet the taxpayer's particular use did not mean that it was of another kind and grade. To this extent only the use test was rejected. The Court of Appeals did not say that ultimate intended use should not be considered in determining whether the price at which a particular transaction took place was a "representative market price". Quite to the contrary the Court noted that there was a distinction of commercial substance between coal of coking and non-coking quality. Further, the Court observed that "*forced* sales owing to peculiar economic conditions", as for example sales made at prices less than the cost of production in order to spread overhead costs, were not made in "open and free competition" and were not properly to be considered in establishing a representative market price. (258 F.2d at 899) Again, here a Court recognized that not every sale is necessarily a "representative" sale.

The next decision by Judge Lynne was *Woodward Iron Co. v. Patterson*, 173 F.Supp. 251 (N.D. Ala. 1959). That case involved both coking coal and red iron ore. As to the red iron ore, it was found that there was no representative market or field price, so that the "proportionate profits" method of computation which the taxpayer desired to employ could be used. With respect to coking coal, Judge Lynne again found, consistent with his earlier decision, that a representative market existed in the Birmingham area and that a representative market or field price for coking coal could be determined. The Court then proceeded to de-

termine such price for the years in question without indicating in its opinion the precise manner in which such determination was made.

The final decision of Judge Lynne was *U.S. Pipe & Foundry Co. v. Patterson*, 203 F.Supp. 335 (N.D. Ala. 1962). That case involved coking coal and two different types or iron ore. As to the brown iron ore, it was held that there was a representative market or field price, so that the taxpayer could not use the proportionate profits method of computing depletion as it had sought to do. As to the red iron ore, it was found that there was no representative market or field price, and the taxpayer was permitted to avail itself of the proportionate profits method.

With respect to coking coal, Judge Lynne held to his previous view that there was a representative market or field price in the Birmingham region. He now said, however, he was convinced that he had been in error in *Woodward Iron* in that the prices arrived at were too high. 203 F.Supp. at 346, fn. 2. He then proceeded to determine new "representative market prices" for the years in question. In so doing it appears that the Court utilized sales of coking coal for purposes other than coking in determining the appropriate prices. It should be noted, however, that generally the sales for other than coking purposes were at prices higher than the prices commanded for coking purposes. 203 F.Supp. at 347. There is no indication whatsoever that in determining representative market prices the District Court utilized distress price sales "owing to peculiar economic conditions" of the type which had been condemned by the Court of Appeals in *Alabama By-Products*, supra. Further, the Court clearly distinguished between washed and unwashed coal prices and *utilized only the washed coal prices*.

In summary then the decisions have not held that a "representative" sale is any sale or that the statute commands

the courts to proceed in blind ignorance of the facts of particular transactions in seeking a representative market or field price. Rather the courts have held that selling "substantial quantities in the market affected by competitive bargaining and principles of supply and demand" will establish a representative market price (*U.S. Pipe & Foundry*, *supra*, p. 348). The courts have pointed out that a small number of sales is insufficient to furnish a market (*Cannelton*, *supra*, p. 78, footnote 2), that transactions will be excluded where "factors other than the market or field price [of the product involved] partly determined the market price" (*Shamrock Oil & Gas Corporation*, 35 T.C. 979, 1036 (1961)) that sales "owing to peculiar economic conditions" do not constitute a market (*Alabama By-Products*, *supra*, at p. 899) and that sales of a mineral product for a different use may not be "representative of the value of the product . . ." (*North Carolina Granite*, *supra*, at p. 161). The Commissioner himself in proposed regulations has taken the position that a representative market price is established by sales made by persons other than the taxpayer "only if such sales are the result of competitive transactions" and that "exceptional, nominal, unusual, tie-in or accommodation sales shall be disregarded." (31 F.R. 9508). With regard to comparisons of minerals, the Court in *United States v. Henderson Clay Products* (*supra*, 324 F.2d at 11-12) observed that the comparison should be on a basis "substantially equivalent by commercial standards" and that "physical, chemical and geological differences have importance only if they give rise to differences in commercial competition."

The sales relied upon by the District Court to establish a representative market price must be examined in the light of these principles.

The undisputed facts establish that, in the case of iron ore, the Utah Construction Company sales were in part for a different intended use, and all were made under "peculiar economic conditions" and not in a situation where principles of competitive bargaining determined the price.

In the case of coking coal, the facts establish that all the Kaiser sales were nominal, of a tie-in or accommodation nature and at less than cost and that all the Utah Fuel Company sales were for a different intended use, made under peculiar economic conditions at less than cost and were not the result of competitive transactions. The facts further establish that the "physical and chemical differences" in the Kaiser coking coal give rise to "differences in commercial completion" which must be recognized in the computation of any representative market price.

1. Iron Ore

a. Utah Construction Company

Central to the District Court's decision on the issue of iron ore is the finding that the transactions of Utah Construction Company established a representative market price for iron ore in the Western United States during the period in question. If this conclusion fails, the entire basis of the District Court's decision fails for there are no other iron ore transactions in the Western United States upon which reliance can be placed. There were only three consumers of blast furnace iron ore in the entire region and, except for the few Utah Construction Company transactions, each user produced its own requirements. (Admissions of Fact Nos. 2 and 7, R. 23-24).

During the two fiscal years in question Kaiser produced from its own mines between 75 and 80% of the iron ore required for its blast furnaces. The location of Kaiser's

plant at Fontana in San Bernardino County, California, was predicated upon the existence of the Eagle Mountain ore deposits. (Powell, Tr. 730, lines 11-13). The Utah source was not a permanent source, but only a supplemental ore source to be utilized until the Eagle Mountain mine went into full production. (Admissions of Fact No. 7, R. 24). The contract itself recited that Utah ore would only be purchased "until the railroad to the Eagle Mountain mine is completed." (Exhibit 2—June 1, 1946 amendment, p. 1)

The Utah ore deposits which served as an interim supply for Kaiser were first controlled by an individual named Senter Walker. During the 1940's Utah Construction Company had obtained a contract to do mining and stripping operations for Colorado Fuel and Iron Corporation. (Christensen, Tr. 489, line 7 to 490, line 8). Senter Walker arranged for Utah Construction Company to perform the same construction activities on this property. (Christensen, Tr. 490, lines 15-21).

In 1946, operating difficulties developed for Walker which threatened to close down his mine. Since Utah Construction had by this time built up an investment in its construction mining facilities, it was interested in continuing the operation, which had a satisfactory profit to it from a contractor's standpoint, at least until its investment in the loading equipment was recovered. (Christensen, Tr. 496, lines 9-14). Therefore, Utah Construction took over Walker's operation and entered into an agreement to complete the obligation which Walker had to furnish ore to Kaiser. At this time Utah Construction was concerned only with developing sufficient return to finance payoff of Walker's arrangement, to recover its investment in the equipment and to make the same construction company profit on the construction-type operation that it was performing in re-

moving iron ore from the property. (Christensen, Tr. 499, line 1 to 500, line 2). In arriving at the ore price under the contract, the previous price was simply continued and *no calculation was made as to the value of the ore.* (Christensen, Tr. 499, line 20).

Shipments for the years in question were made under a subsequent agreement arrived at by negotiation. When these prices were established, Kaiser was, for all practical purposes, Utah Construction's only customer and Utah was very much aware that other customers were necessary. (Christensen, Tr. 502, lines 13-17; 505, lines 8-20). Utah was also aware that while purchases of blast furnace grade ore by Kaiser would shortly cease, Kaiser would still have need for open-hearth grade ore and that it was desirable to continue this market if possible. The price reflected Utah Construction's cost of operation, payments under the Walker arrangement, and a profit "more from a contractor's standpoint . . . than as a commodity price". (Christensen, Tr. 507, lines 10-19). It was hoped in the long run to be able to utilize the Utah mine in shipments of blast furnace grade ore to other users and raise the price to "a fair commodity value". (Christensen, Tr. 508, lines 1-3). This uncontradicted testimony by Mr. Christensen, the former President of Utah Construction Company, clearly establishes that business considerations far different from the usual buyer-seller relationship were the reasons for the prices to Kaiser and that such prices were not the result of competitive considerations which gave rise to a representative market price. The situation closely parallels that considered in *Carey Salt*, supra, where special rock salt sales were excluded in determining representative market price.

The only other sales of blast furnace iron ore in any quantity during the years in question by Utah Construction

Company were sales to Kaiser-Frazer Parts Corporation, one sale to Geneva Steel Company, and a series of sales for export to Japan.⁸ The Kaiser-Frazer Parts transaction was occasioned by the activity of that company in leasing a blast furnace at Ironton, Utah, in order to enable it to produce pig iron which it could exchange for steel needed in its automobile operations during a critical period. (Christensen, Tr. 504, lines 24 to 505, line 7). The sales to that company continued for only about a year until Kaiser-Frazer went out of business. Kaiser-Frazer Parts was a company affiliated with Kaiser Steel and the price to Kaiser-Frazer was tied to the price to Kaiser Steel. (Exhibit 2—Agreement April 2, 1948—attached Exhibit B). The transaction with Kaiser-Frazer Parts for the sale of ore and the price established therein was subject to all the same considerations which surrounded the transactions with Kaiser Steel and for the same reasons was in no way indicative of any normal buyer-seller relationship or of any representative market price.

The one sale to Geneva Steel Company in 1950 represented the clean-up by Utah Construction Company of stock piles of fine and soft ore which had accumulated as a residue from other sales. (Christensen, Tr. 531, line 12 to 532, line 5). The inordinately low price of \$1.29 per ton (which was even lower and almost one-half of the price to Kaiser (\$2.36 per ton)) was principally because of this fact. It was shipped to Geneva Steel at its blast furnaces in Provo, Utah. Under no circumstances is it proper to include this transaction in a determination of representative ore prices.

8. The other transactions listed in Finding 22 (R. 36-7) consist of minimal sales to cement companies for use in making cement and sales of small quantities of open-hearth ore to foundries and to Carnegie-Illinois. These are all nominal sales either of a different commodity or for a special purpose (Christensen, Tr. 526-529).

It is clearly an unusual sale under distress circumstances of a mineral product of different grade.

The remaining transactions of any size were the export sales to Japan. Utah Construction Company was in fact the first and only shipper to the Japanese for some years. (Christensen, Tr. 513, line 24). The only shipments of iron ore to the Japanese from the United States during the period 1939 to 1950 were those made by Utah Construction Company. After World War II, when the Japanese steel industry was just beginning to get back on its feet, Utah Construction was approached by brokers and asked for an ore price. This had to be a price which would enable those brokers to make a sale to the Japanese steel industry (then controlled by the Supreme Command of the Allies in the Pacific) within the limits of bids which already had been made by them. (Christensen, Tr. 508-512). All sales were on the basis of spot shipments. The sales were made at a price which Mr. Christensen said was getting closer to a reasonable market price. (Christensen, Tr. 527, lines 16-20). The market for these sales was at Long Beach, California which was the point of shipment to Japan. It is much closer freightwise and geographically to Kaiser's Eagle Mountain mine than to the mines in Utah of Utah Construction Company. It is obvious that here again a temporary business opportunity was available to Utah Construction Company, in a market which had never existed theretofore and under circumstances, due to the military control of the market, which dictated that any price set had to fall within bids already made by brokers and without regard to the seller's evaluation of a proper price for its commodity. So far as Utah Construction Company was concerned, any price which it got for its commodity above that for which

it was selling to Kaiser was an improvement, but it still was not a representative market price for iron ore.⁹

The nominal amount of these sales affords another reason why they cannot be relied on. An expert economist so testified, (Carrier, Tr. 639, lines 20-25; 684, lines 11-14), and the uncontroverted facts in evidence support this conclusion. This witness, Mr. Carrier, stated that he had examined all the transactions which have been discussed. He further stated that market prices can only be set by market forces, which include the number and nature of buyers and sellers, the nature of the transactions involved, whether they are at arm's length, the bargaining power of the parties, the quantity of the commodity transferred, and the type of industry concerned. (Tr. 631, lines 6-19). Mr. Carrier pointed out that the total consumption of ore, as distinguished from transactions relied on, is significant in the determination of the existence of a market, and that the independent "sales" were such a small fraction of the total amount of iron ore consumed (Exhibit 3) that they cannot be relied on to establish a truly representative market price.

For all of the many and varied reasons just recited the Utah Construction sales did not establish a representative market price. In the language of the Commissioner's proposed 1966 regulation they were not the "result of competitive transactions", but were "exceptional, unusual and of a tie-in" nature and must be disregarded.

b. Lower Lake Port Prices

Since there were no actual transactions in the western United States which can be utilized to establish an appro-

9. It is significant to note, with regard to the Utah sales, that the only market which Kaiser's Eagle Mountain mine could have participated in was the one at the Kaiser Fontana steel plant and the one at Long Beach, California, for export.

priate representative market price for Kaiser's ore, representative markets for the commodity involved in other parts of the United States must be referred to. The propriety of this approach was recognized in regulations proposed by the Commissioner himself in 1956. (21 Fed. Reg. 8439).¹⁰ These proposed regulations provided (at p. 8450) :

". . . the term 'market price' means the price . . . at which the gross income product is sold commercially in the vicinity of the taxpayer's mine. . . . If there are no such commercial sales in such area, then the market price of the gross income product . . . must be determined by the use of other appropriate methods with the objective of determining as accurately as practicable the price at which such gross income product would be sold if such commercial sales existed. Among such methods that may be appropriate, depending on the circumstances of each individual case, are the following:

* * * * *

(ii) Comparison of the prices at which crude mineral products or processed mineral products identical or similar to the taxpayer's gross income product are sold commercially *in other areas*, with proper adjustments being made for material differences, if any, between the taxpayer's gross income product and the product sold commercially (such as differences in kind or grade or mineral content or ordinary treatment processes involved or transportation costs between mine and market or relative volume of sales)" (Emphasis added).¹¹

The only recognized United States iron ore market in which a substantial volume of transactions occurs at mar-

10. Appendix D hereto. See Appendix, page 7.

11. It may be noted here that in 1966, while this case was still in the District Court, the foregoing proposed regulations were "withdrawn" and new regulations were proposed which omitted the foregoing language. 31 F.R. 9506.

ket prices fixed in arm's length dealings is at the Lower Lake Ports. This market has existed since the turn of the century. (Pardee, Tr. 584, lines 17-20). Reported prices for these transactions are available from standard reference sources. (Exhibit SS). It was undisputed that Kaiser's Eagle Mountain ore was of at least equal quality with Lower Lake Port ore of the "Mesabi non-Bessemer" classification. (Pardee, Tr. 583, lines 18-24). A representative market price for Kaiser's ore delivered to it at its Fontana plant should be the same as the price of Lower Lake Port ore on the docks at the Lower Lake Ports, taking into consideration the commercially applied and recognized adjustments for iron content, etc. These are the prices which Kaiser proposes to use.

The Lower Lake Port prices have frequently been used in connection with commercial transactions geographically distant from the Great Lakes. They have been used in leases for iron ore property as the basis for royalty to be paid, including leases on such properties in Utah (Christensen, Tr. 534). They have been used in valuing mining property—including property in California and Utah (Pardee, Tr. 590). They have been used in connection with setting of ore prices for foreign concessions (Christensen, Tr. 534). And most significantly they have been used by the Utah State Tax Commission as the base for valuing iron ores mined in Utah (Higgs, Tr. 623) rather than using sales prices, such as sales by Utah Construction Company (Christensen, Tr. 534).

In applying Lower Lake Port representative market prices the only adjustment under our facts is for Fe content of Kaiser ore (Exhibit SS, tables 14 and 15, pp. 234-5). It is a simple matter, therefore, to make this adjustment to Lower Lake Port prices for Mesabi non-Bessemer ore

as published for the years 1948, 1949 and 1950, to convert the prices thus arrived at from a calendar year to Kaiser's fiscal year basis and arrive at a representative market price for the Eagle Mountain and Vulcan ores. Since we are concerned with a mine price, it is also necessary to reduce this adjusted price by the freight from the Eagle Mountain and Vulcan mines to Fontana. These calculations are all reflected in the attached Appendix F and the resulting prices are as follows:

	Eagle Mountain Mine	Vulcan Mine
1949	\$4.159	\$4.472
1950	\$5.132	(no shipments)

These are the representative market prices for Eagle Mountain and Vulcan ores.¹²

As further support for the use of these prices, Kaiser presented extensive economic evidence. This evidence, compiled over a period of thirteen years from 1948 to 1961, established that in the case of finished steel products of eastern producers, the relationship to the price of ore at Lower Lake Ports is such that about 93% of the variation in Lower Lake ore prices can be accounted for by the variation in the finished steel composite prices (Exhibit 7). For the same period, and with regard to pig iron prices of eastern producers, the relationship is such that over 97% of the variation in the Lower Lake ore prices can be accounted for by the variation in the composite pig iron prices (Exhibit 8). This direct relationship between ore price and pig iron and finished product price is striking. It shows that the ore price follows directly along with and is a function of the product price.

12. Appendix F hereto.

These product and pig iron prices of eastern producers have a very direct and immediate effect on pig iron and finished products produced in the western market. This is because there is substantial competition in the sale of steel products in the West between products produced by the purchasers and consumers of the Lower Lake Port ore from that ore and products produced by Kaiser from its ore. (Carrier, Tr. 650, lines 16-24). This competition included not only Kaiser but all the western producers and involved plate, shapes, sheets, strips, bars, pipe, tinplate, wire products and specialty items. It was a substantial competition. For example, in 1949 total consumption in the West of these competing items was 4.3 million tons, of which western production capacity accounted for 2.2 million tons and eastern production the balance (Howard, Tr. 823-829). Even though no Lower Lake Port ore is sold or consumed as ore in the western United States, such ore does find its way into these finished products. Neither ore, therefore, exists in a vacuum independent from the other. These price relationships between pig iron and finished products are such that during the period 1949 through 1961, more than 99% of the variations in pig iron and finished steel product prices at Kaiser's Fontana mill can be accounted for by the competition from eastern producers (Exhibits 5 and 6).

Where such competition between end products exists, the evidence also established that comparable cost-price relationships can be expected to occur between raw materials and the finished product in the different geographical areas (Carrier, Tr. 645-650) and that competition in final products develops uniformity in price for raw materials (Carrier, Tr. 660, lines 12-23). These relationships between ore and pig iron, or finished product, are such that in a free market it is possible to predict from the pig iron prices

an ore price within an accuracy of 3% (Carrier, Tr. 667) and if a similar free ore market had existed in the West, the same accuracy was to be expected (Carrier, Tr. 666). Applying these principles, a computation was made by Mr. Carrier from which he concluded that he would have anticipated in a free western market that Kaiser would have had an ore price at Eagle Mountain of \$5.17 for the fiscal year 1949 and \$5.92 for the fiscal year 1950 (Exhibits 11 and 12), making allowance for the fact that in the years 1948, 1949 and 1950 the relationship between ore and pig was slightly below the average for the entire eleven years which he considered in his study. This testimony fully supports use of the representative market prices computed in accordance with the method reflected in the attached Appendix F.

The District Court rejected the use of the Lower Lake prices upon the basis that ". . . the Great Lakes area was an independent market insofar as the plaintiff is concerned and sales within that independent market area had no economic effect upon the plaintiff's market area . . ." (Finding 33, R. 40). This finding lacks any support in the evidence and is completely contrary to all of the undisputed evidence in the record. The economic effect upon Kaiser's market area of the Lower Lake Port prices was conclusively demonstrated by Mr. Carrier's testimony to which we have referred above. It was conclusively shown that price of finished products produced from the Lower Lake Port ore has a direct and provable relationship to the price of that ore. It was further conclusively shown that those finished products are in direct competition with finished products produced from western ore and that they were in competition with each other in plaintiff's market area. Exactly similar economic relationships were shown between finished

product prices in the East and the West and pig iron. The conclusion is inescapable that western ore prices are affected by eastern ore prices and that these afford a representative market price.

c. Application of Representative Market Price

Even if we are to assume that the action of the District Court in rejecting Lower Lake Port prices as establishing a representative market price is to be upheld, the decision of the District Court in establishing a representative market price derived from Utah Construction Company sales constitutes clear reversible error. The District Court concluded that a weighted average of the mine prices realized by Utah Construction Company from *all* of its sales constituted the representative market price to be applied at Kaiser Eagle Mountain and Vulcan mines in California. This mine price was a mine price realized by Utah Construction Company in the State of Utah. It was a mine price derived from sales made to users of ore in many different and diverse geographical locations, (remote from Kaiser's mines in California), from sales made of open-hearth ore as well as blast furnace grade ore (even though Kaiser's mines in California produced no open-hearth ore) and from sales made of essentially waste products entirely dissimilar to the high-grade iron ore produced at Kaiser's California mines (such as the sale to Geneva Steel Company).

It is apparent that the District Court absolutely misconceived the meaning of "representative market price." It concluded that any mine price realized at the mine in Utah was a "representative market price" and was the mine price which would have been realized at Kaiser's mines in California. The Court's error lies in its assumption that the realized mine price in Utah would be the same in California, and it arises primarily from the fact that the mar-

ket in which the representative market price would be created was not given any consideration. The Court was not confused as to the proper rule since in Conclusion of Law No. 7, it stated, "The representative market price of a mineral is the price that is actually paid by buyers for a mineral product of like kind and grade in the same market." (R. 52) The Court, however, misapplied the rule.

The "price actually paid by buyers" in any market consists of the gross amount which that buyer must spend to obtain the product he desires either at a well-established market where the product is traded and sold, such as the Lower Lake Ports, or, in the absence of such a well-established market and in the case of isolated transactions such as exist here, at the place where the buyer takes the product for use.

The only justification for using market prices received by others in order to arrive at a representative market price for a taxpayer who has made no sales, is upon the premise that such a taxpayer would or could have competed in and sold his product in the same market. Thus it presupposes that the Kaiser Fontana mill or the Long Beach, California, export shipper would have been willing to pay the same amount of money to obtain Kaiser's Eagle Mountain ore as in fact was paid to obtain Utah Construction Company's ore. The market is the place where that buyer takes the ore and not at the mine of Utah Construction Company or the Eagle Mountain mine. The representative market price obviously consists of the gross amount which that buyer pays. The "mine" price which is to be used for the purpose of depletion can only be arrived at by deducting from the representative market price paid by the buyer the segment of that price which consists of the cost of delivering that ore from the mine to the buyer.

This principle is well illustrated by the situation which, in fact, exists at the Lower Lake Ports. The "representa-

tive market price" is established at the Lake Erie Ports. For Mesabi non-Bessemer ore, for example, it was \$7.70 in 1950 (Exhibit SS, Table 17, p. 240). This price included the price at the mine, the rail and freight rates, dock and loading charge, transportation tax, interest, insurance and incidentals. In the case of a mine owner in Minnesota, the cost of moving this ore from the mine to the Lower Lake Ports market was \$2.30 and he realized a mine price of \$5.075 (Exhibit SS, Table 17). However, in the case of a mine in Wisconsin or upper Michigan which shipped from the Eastern Marquette Range, the cost of transporting that same ore to the same market was \$1.905 (Exhibit SS, Table 16). He thus realized a mine price of \$5.46. It is difficult to believe that any court would conclude that the Michigan producer would be required to use a mine price of \$5.075 for depletion purposes simply because this was the price that was realized by the Minnesota producer.

The concept of adjusting the representative market price by transportation costs between the mine and the market in order to arrive at a mine price has been recognized by the Commissioner. The regulations proposed by him in 1956 listed among the pricing factors to be considered "transportation costs between mine and market." (21 F.R. 8450)¹³

The concept was also recognized, approved and accepted by the Government in connection with Kaiser's original tax returns (Exhibits Q and R).

The concept was expressly recognized by the Government itself in connection with the trial of this very matter. It is visually and clearly demonstrated by Exhibit JJ, which the Government itself prepared and introduced into evidence. The Government's own witness, Dr. Jones, testified in support of the procedure, stating (Tr. 859, lines 9-13) :

13. Appendix D hereto, Appendix, page 7.

"I wouldn't want to compare the price at Eagle Mountain with the value of the ore at Utah. I don't think it can be done that way. You have to consider how far away they are from Fontana, and that is the adjustment I made."

So clear, indeed, is the propriety of this method of determining a representative "mine" price that Kaiser had no reason to suppose it was at issue in the proceeding until the District Court's Findings were received. So startling was the position adopted that Kaiser urged it as a ground of surprise sufficient to require a new trial so that the evidence of the Government's acceptance of the well-established principle could be introduced (R. 67-69).

The basic question is which representative market prices are to be used so that a mine price can be derived from them to be applied at Kaiser's mines in California. Here, again, the decision of the District Court is based upon substantial reversible error. As pointed out above, the Court did not use representative market prices but instead used Utah mine prices. However, even in selecting the mine prices to be used, the Court misconstrued the applicable rule. In its Findings, the Court said that the prices to be used were those paid by buyer "in the same market" (Conclusion of Law No. 7, R. 52-53). This same language recognizing that it must be in the "same market" appears in Finding No. 8 (R. 53). The Court applied this rule to exclude the Lower Lake Port prices "because of the remoteness of the sites of such sales from the area of plaintiff's operations and the absence of any sales or shipments of such ore to the area of plaintiff's operations." (Finding 33, R. 40). However, when it came to considering the Utah Construction Company sales, the decision throws a blanket over each and every one of those sales, irrespective of whether they were made in the same market as Kaiser's

operations or in the area of Kaiser's operations. Looking at the Utah Construction Company ore sales (Finding 22, R. 36-37), it is readily evident that the only sales in the same market as or in the area of Kaiser's operations were the sales to Kaiser at Fontana, California, and the sales for export to Japan at Long Beach, California. We have already shown that all other sales must be disregarded, irrespective of their not being in the area of Kaiser's operations, for the separate reasons that they represented sales of a different commodity or sales under peculiar and unusual circumstances of a distress nature. We repeat that, in addition to these reasons for disregarding them, there is the equally compelling reason that they were made in unrelated geographical markets. As Conclusion of Law No. 7 states, "prices paid by buyers in unrelated geographical markets . . . have no bearing on the representative market price of the mineral." (R. 53)

With regard to the sale to Kaiser at its Fontana mill, we have clearly demonstrated that this must be disregarded because of the exceptional and unusual circumstances surrounding it, with the consequence that it did not establish any representative market price. If we are to use any of the Utah sales for the purpose of a representative market price, the only ones which come close to establishing such a price are the export sales made at Long Beach. These were sales of blast furnace grade iron ore made at Long Beach which is in the market area Kaiser could have served from its California mines. These were sales at prices which were getting closer to a representative market price (Christensen, Tr. 527, lines 16-20).¹⁴

14. The Utah *mine* prices at which these export sales were made (1948—\$3.18, 1949—\$3.78 and \$2.36) are proof in themselves that the prices at which Utah sold to Kaiser Steel (1948—\$1.88, 1949—\$2.18) are not a representative market price for Kaiser's Ore.

The representative market price of these export sales at Long Beach, California, (consisting of the mine price and the average freight) was \$7.65 in 1948 and \$8.30 and \$7.06 in 1949 (Exhibit 1). In order to arrive at a mine price to be used for depletion purposes at Kaiser's mines in California, it is necessary to deduct from this representative market price the transportation cost from Kaiser's mines to Long Beach. These freight costs were, on the average, \$2.40 (Ferrum, California, to Long Beach, Exhibit 27, and Eagle Mountain to Ferrum, Exhibit 10). The result is a mine price at Kaiser's Eagle Mountain mine of \$5.25 for the 1948-49 sales and \$5.90 and \$4.66 for the 1949-50 sales. These are the mine prices Kaiser would have realized based upon the representative market price for the export sales. This compares with the \$2.29 for 1948-49 and the \$2.03 for 1949-50 set forth in Finding 35 (R. 41).

2. Coking Coal

The representative market price for coking coal was based solely upon the prices received by Kaiser for a small volume of transfers to third parties from its production at Sunnyside Mine No. 2 and prices received by Utah Fuel Company from its production at Sunnyside Mine No. 1 (Findings 51 and 52, R. 45). The Court's conclusion that these transactions are to be used at all is completely contrary to the principles of the regulations (present and proposed) and the decided cases (*Supra*, pp. 18 to 27). Such transactions should be disregarded because all of them were of either a tie-in or accommodation nature, or in a nominal amount, or were made for an entirely different use under peculiar economic conditions which resulted in their being made at less than cost and not as the result of competitive transactions.

A representative market price was established by the sales of coking coal made in the open market by Raton Coal Company to Colorado Fuel and Iron Corporation. The Court found that these coals "competed directly in the market place" with Kaiser's Sunnyside coal (Finding 70, R. 50). The Court nevertheless failed to use any of the prices for such coal in arriving at a representative market price.

In arriving at a "representative market price", the Court disregarded the uncontradicted evidence that regular commercial and market practices (1) require upward adjustments in determining the price for Kaiser's coking coal because of (a) it being a washed coal instead of an unwashed coal, and (b) its low ash content, and (2) do not recognize any penalty for the sulphur content or lower plasticity of the Sunnyside coal. Instead, the Court found, contrary to all the evidence, that somehow these recognized advantages of the Kaiser coal had been minimized. (Finding 69, R. 50) and failed to make any such adjustments.

a. Sunnyside Mines

Kaiser obtained its high volatile coking coal requirements from Sunnyside Mine No. 2 in Utah. This coal was mined by Kaiser. In addition, Kaiser purchased lesser amounts of Oklahoma-Arkansas low volatile coking coal for blending purposes.

The Sunnyside coal field is located in Carbon and Emery Counties in Utah. It is one of the two significant fields of high volatile coking coal in the Western United States. Columbia-Geneva Steel owned and operated its coking coal properties in the Sunnyside field (Heiner, Tr. 309-311) adjacent to the Sunnyside mines.

The Sunnyside mines (known as Nos. 1 and 2) were owned for many years by Utah Fuel Company. Although

Utah Fuel Company owned a number of other mines from which coal for domestic and general business purposes was produced and sold, the Sunnyside mines were the only ones which produced coal with coking properties. The Sunnyside No. 2 mine was closed down by Utah Fuel Company in 1924 and remained closed until 1942 when a ten-year lease was entered into with Kaiser for this property. (Heiner, Tr. 325-327). Utah Fuel Company, however, had kept the Sunnyside No. 1 Mine open and made certain sales of coal from that mine.

The testimony of Mr. Heiner, the former President of Utah Fuel Company, was that the company had not been able to operate the Sunnyside No. 1 Mine at a profit since 1929. (Tr. 331, lines 8-11). This resulted from the fact that although the coal produced was a coking coal and valuable for coking purposes, the same coking characteristics made it unsuitable and not salable for commercial or domestic use. (Heiner, Tr. 414, lines 10-15). The coal made coke trees and plugged up stokers. (Heers, Tr. 66, lines 23-25). It was too smoky, dirty and tough to handle. (Heiner, Tr. 330). However, the No. 1 Mine was kept open and sales at less than cost for commercial and domestic purposes were made from it (Heiner, Tr. 416) because, as the President of Utah Fuel Company testified, it was recognized that limited reserves of coking coal were available in the West and when the steel industry expanded in the West, the property and its coking coal could become much more valuable when used for the making of coke in the production of steel. (Tr. 331; 373, lines 19-22). Except for this expectation, Utah Fuel would have closed the mine down because its coking coal could not compete in the commercial and domestic market due to its unsuitability for that use (Heiner, Tr. 328-330; 347-349; 417).

The hoped for expansion of the steel industry in the West began to emerge when Kaiser commenced production of steel in the western United States during World War II. Utah Fuel Company was able to reopen its No. 2 Mine by leasing it to Kaiser in 1942. Kaiser operated the mine under lease during the tax years in question, and utilized virtually all the production in Kaiser's own steel making operations. However, the expansion at that time was not sufficient to include Utah Fuel's No. 1 Mine and, in order to keep it open, that company was forced to continue its practice of making commercial and domestic sales at less than cost. Ultimately, the expansion did include Utah's No. 1 Mine in 1950 when Kaiser purchased it to add to its coking coal reserves. (Finding 48, R. 44).

During the tax years in question, Kaiser made sales from its own production in amounts as indicated in Finding No. 41 (R. 42-43). These transactions all were in extremely small amounts, were of an accommodation nature and were made at cost.

The representative market price established by Finding 52 (R. 45) is based entirely upon the sales made by Utah Fuel Company in the tax years in question out of its Sunnyside No. 1 Mine and upon the small volume of sales made by Kaiser out of its Sunnyside No. 2 Mine. Let us turn first to the sales made by Utah Fuel Company. Finding 46 (R. 44) is in accordance with the evidence and establishes that "all or nearly all of the Sunnyside coal that it (Utah Fuel Company) sold was used by the purchasers for heating purposes or for making steam rather than for making coke." Other than this brief statement the Findings do not reflect in any respect the circumstances surrounding these sales by Utah Fuel Company. Here again we find the Court falling into the error of assuming that simply because there was a

sale, the price realized from that sale automatically becomes a "representative" market price irrespective of the circumstances. This, however, is not the law. In the words of the Commissioner's proposed 1966 regulations, such prices are to be taken into consideration "only if such sales are the result of competitive transactions" and "exceptional, nominal, unusual, tie-in or accommodation sales shall be disregarded." (Appendix E, Appendix, pages 16-28).

The actual circumstances, as disclosed by the evidence, show that these sales by Utah Fuel Company cannot establish a representative market price. These facts and circumstances are that the coal produced by Utah Fuel from its Sunnyside No. 1 Mine was not "salable for commercial or domestic use" (Tr. 414, lines 10-12), that Utah Fuel had to hunt for places to sell this coal (Tr. 328, line 17), that the coking characteristics of this very coal made it unsuitable for commercial or domestic sale, and that the only reason the company kept the mine open and attempted to make any sales from it was for the significantly different business purpose of ultimately disposing of the property in the coking coal market (Tr. 373, lines 19-22). Prices established by such sales, irrespective of the profit they might produce, are clearly not made under any competitive conditions which could give rise to a representative market price. They can only be classified as sales made under peculiar economic conditions and, in effect, distress sales. We are not aware of any court decision which has included this type of sale in establishing a representative market price. On the contrary, the *Carey Salt Company* case, *supra*, the *North Carolina Granite Corporation* case, *supra*, and the Fifth Circuit Court of Appeals in the *Alabama By-Products Corporation* case, *supra*, have held that this type of sale was not properly to be considered in establishing a representative market price.

One of the most significant pieces of evidence which the Court overlooked is that from 1929 on, the Utah Fuel Company was unable to operate the Sunnyside No. 1 Mine at a profit and that the sales made from that mine were, during this entire period (except for the last year of 1949), made at less than cost. It is difficult to conceive how any transaction which occurs at cost or less than cost can be regarded as being in any sense a representative transaction, particularly where the sales made are occasioned by a desire to accomplish an ulterior business purpose and without regard to any normal considerations of competitive market or supply and demand. It is more difficult to understand how these sales at less than cost can be considered when in Finding 41 (R. 42) the Court excluded from its computations of representative market price a transfer made by Kaiser from its Sunnyside No. 2 Mine with the following language—"but this was made at cost and is not treated here as a sale." Perhaps we can best summarize the circumstances surrounding these transactions in the words of Mr. Heiner, the President of Utah Fuel Company, when he testified as follows:

"We had tried every means we could to introduce the Sunnyside coal to our regular commercial dealer trade, but the Sunnyside coal was not wanted; they wouldn't have Sunnyside coal as such because it was too smoky and too dirty a coal to burn in the ordinary stoker or even in the grates or fireplaces—we couldn't sell it to dealers—we hadn't operated No. 1 Mine at a profit in all my knowledge and from company records it had been a losing proposition beginning in 1929 until at least 1949—our one hope was to keep that Sunnyside mine open to fit into the coking coal picture somehow." (Tr. 330-331).

The inclusion, as a part of a weighted average for determining representative market price, of the sales made by Kaiser Steel Company from its Sunnyside No. 2 Mine is even more mystifying. Here, again, the surrounding facts are not considered or weighed by the Court except in a very strange way. In Finding 41 (R. 42) it is stated that the coking coal from Sunnyside No. 2 Mine was "suitable" for non-coking uses. There is no evidence in the record to support this statement. All of the evidence is to the contrary, as pointed out above in connection with the Utah Fuel Company sales. The Court then finds that "such sales were made in competition with sales of coal *not* suitable for coking." When we examine these sales, we find that they consist of the following: *First*, the largest of them is a transfer at cost to Columbia Geneva Steel Company which operated an adjacent coking coal property for the purpose of accommodating and helping out in case of strike, exchange of coal for testing, or exchange of coal by reason of encroachment on the property of the other (Admissions of Fact, paragraphs 23, 24 and 25, R. 25-26; Heers, Tr. 94-95). *Second*, there were accommodation transfers made to Utah Fuel Company, the landlord, in the taxable year 1950 to help it out with one of its customers (Heers, Tr. 96) and other accommodation transfers made in the taxable year 1949, partly occasioned by the necessity of equalizing washer tonnage due to the fact that both Sunnyside Mines No. 1 and No. 2 utilized the same washing facilities (Heiner, Tr. 335-336). *Third*, the other sales "made in competition" consist of a 54-ton transaction with Permanente Metals, an affiliated company to whom coal was sold at cost for testing (Heers, Tr. 95, 116), and two transactions with the Denver & Rio Grande Western Railway, resulting out of bad order cars(Heers, Tr. 97, 107, 117). The complete misconception

of the nature of these sales is again most strikingly illustrated by the fact that these transactions were made at cost according to the undisputed evidence (Heers, Tr. 95, 97, 107, 116, 123). The Court in Finding 41 (R. 42) recognized that transfers at cost are *not* to be treated as sales when it so stated with regard to the transfer made by Kaiser Steel to Kaiser-Frazer Parts. Although we are admittedly prejudiced in this matter, it seems most clear that none of the transactions involving Utah Fuel Company or Kaiser Steel Corporation can, under any reasonable view of the evidence or the law, be regarded as having established any representative market price.

b. Raton Coal Company (Koehler) Mines

The testimony is uncontested that available sources and reserves of coking coal are extremely scarce in the West (Heers, Tr. 80, 81). The only fields in the years in question from which high volatile coal could be secured for coking purposes by the western steel industry were (1) the Sunnyside area in Utah, which contained the mines from which Kaiser Steel obtained its coking coal and the mines from which Columbia Geneva obtained its coking coal, and (2) the Raton Mesa area in southern Colorado and northern New Mexico which contained the mines from which Colorado Fuel and Iron Corporation obtained its coking coal (Kastler, Tr. 190; Keenan, Tr. 245-249, 251-253; Heiner, Tr. 311). The mines in the Raton Mesa area were for that reason of considerable interest to Kaiser Steel as being the only other proven source of coking coal in the West and the next best source to Sunnyside (Heers, Tr. 109).

The St. Louis, Rocky Mountain & Pacific Company (referred to as the Raton Coal Company) owned and operated the Koehler, Brilliant and Van Houten mines in this Raton

Mesa field which produced coking coal (Exhibit 34, Dunn Deposition, Exhibit C, pages 3, 4, 5, 6; Findings 65, R. 48). Colorado Fuel and Iron Corporation produced coking coal from its own mines in the Raton Mesa area. Colorado Fuel and Iron Corporation also purchased high volatile coking coal for use in its steel making processes. Nearly all of the purchases of high volatile coking coal by Colorado Fuel and Iron Corporation were from Raton Coal Company in the taxable years in question (Finding 65, R. 48). These purchases were in very substantial amounts, consisting of 491,980 tons in the calendar year 1948, 336,619 tons in the calendar year 1949, and 345,897 tons in the calendar year 1950 (Exhibit H). These very substantial sales of high volatile coking coal clearly represent an established market, and it is equally obvious that a representative market price resulted. These were the only sales of high volatile coking coal in the West for coking purposes (other than incidental purchases in relatively small tonnages made by Colorado Fuel and Iron Corporation from other producers in the Raton Mesa area) and the only sales of coking coal for any purpose which were made in the course of competitive transactions.

It is clear that these actual sales transactions competed in the same market as Sunnyside (i.e.—the market at the Fontana, California steel plant). This results from the fact that the freight rate from the Raton Coal Company mines to the Kaiser Steel plant at Fontana was the same as the freight rate from the Sunnyside mines to Fontana. In 1946, a specific request was made for the establishment of such an equal freight rate, and this rate was actually established in 1949 (A. Heiner, Tr. 786-787; Exhibit 30). If Kaiser Steel had desired to make any shipments of coal from Raton at an earlier date, such as 1948, the railroad would have equalized the freight rates at such time (A. Heiner, Tr. 787).

In view of these facts the Court very properly concluded that "the Raton Mesa coal and the Sunnyside coal of the plaintiff competed directly in the market place, were both suitable for production of coke when blended with low volatile coal and were similarly utilized. . . ." (Finding 70, R. 50).

It would seem to follow naturally from this finding that in arriving at a representative market price for the Sunnyside coal, the Court would have included the quantities and prices of the coking coal sales from Raton to Colorado Fuel and Iron. *This was not done.* These sales are brushed off by a vague finding to the effect that they "confirm the fact that the sales price obtained by Utah Fuel Company for its Sunnyside coal was representative of the market price. . . ." (Finding 71, R. 50). On the contrary, these prices even without making the necessary adjustments for difference in ash content and washing loss, confirm the fact that the prices obtained by Utah Fuel Company were *not* representative. The sales prices from Raton Coal Company to Colorado Fuel and Iron average \$5.08 in 1948, \$5.24 in 1949 and \$5.44 in 1950 (Exhibit H). This compares with the average price received by Utah Fuel Company for substantially smaller tonnages of \$4.80 in 1948, \$4.79 in 1949 (Finding 47, R. 44) and approximately \$4.50 for the first two months of 1950 (Finding 49, R. 44).

It is clearly reversible error for the District Court not to have also used the sales by Raton Coal Company to Colorado Fuel and Iron Corporation for the establishment of a representative market price.

Finding No. 65 (R. 48) lists other tonnages sold by Raton Coal Company in addition to the sales made to Colorado Fuel and Iron Corporation. All of these sales, with very few exceptions, were for commercial or domestic purposes

and did not take into account the ash adjustments and the adjustments for washing costs which are recognized commercial practices in the West in the pricing of coal to be used for coking purposes. These adjustments will be discussed in the next section of this brief. If any use were to be made of these sales, these adjustments would have to be computed and the record does not contain evidence which would enable this computation to be made. Practically all of the tonnage sold by Raton was to Colorado Fuel and Iron and the Santa Fe Railway and all of this coal was sold in an unwashed condition (Kastler, Tr. 195, 221). It is interesting to note that in any event the price of the unwashed coal sold to Santa Fe Railway was approximately the same as the price of the unwashed coal sold to Colorado Fuel and Iron. Other than these, the sales were in small amounts and were entirely for steam or domestic purposes (Kastler Tr. 184, 189). The prices indicated for the sales to retail dealers, which are extremely low, reflect the same deficiencies in coking coal for domestic uses as was found to be the case by Utah Fuel Company when it engaged in its distress sales of coking coal for domestic use.

The significant sales made by Raton Coal Company, so far as the present case is concerned, are those made to Colorado Fuel and Iron Corporation. These are the sales which establish a representative market price. This was the principal market which Raton Coal Company had. These were the only sales made for coking use (Kastler, Tr. 191-195). The Court has found that these sales competed directly in the market place with the plaintiff's Sunnyside coal. These are the sales which must be used in order to determine a representative market price for Kaiser's Sunnyside coal.

c. Recognized Commercial Price Adjustments

As mentioned earlier, the most important factors in coking coal and the thing which steel manufacturers are buying when they purchase coking coal is the fixed carbon in this coal. This is the element in coking coal which provides the fuel in the blast furnace. Thus, it is desirable to obtain as much fixed carbon as possible when purchasing coal (Finding 54, R. 45).

The most undesirable element in coking coal and the thing which steel manufacturers desire not to purchase is ash. Ash is the term used in the coking coal industry to describe the impurities in coal other than volatile matter, sulphur and phosphorus. (Finding 58, R. 46). Per unit of weight, the fixed carbon increases as the ash decreases.

Coal as mined contains ash in the form of "free impurity," sometimes called rock or shale (Exhibit 36, Bertholf Deposition, page 10), which can be removed from the coal by washing. Coal as mined also contains ash in the form of "inherent ash" which cannot be eliminated from the coal by any commercially feasible washing or cleaning process. (Exhibit 36, Bertholf Deposition, page 11). In order to remove the ash existing as a "free impurity" from the coal, washing of coal is practiced as a normal operation throughout the West and is an ordinary treatment process. (Heers, Tr. 89; Keenan, Tr. 267-268). All of the decided cases to date involving representative market prices for coking coal, including *Alabama By-Products*, *Woodward Iron* and *United States Pipe*, have distinguished between washed and unwashed coal in determining prices. It is quite obvious that each ton of coal which has been purchased and is then washed will after washing weigh less than a ton because of the elimination of the "free impurity." This loss suffered in the course of washing is referred to in the trade as the "washing yield." For example, the coal purchased

by Colorado Fuel and Iron from Raton's Koehler mine in 1949 had an 83.07% yield after washing—in other words, of each ton of coal as purchased, only 83.07% of that ton remained for use in the coke oven after the washing process was completed (Exhibit 36, Bertholf Deposition, page 24).

The coal produced from the Raton mines and purchased by Colorado Fuel and Iron was in an unwashed condition. The coal produced from the Sunnyside mines by Kaiser for which it is necessary to construct a price was in a washed condition. In arriving at a representative market price for *washed* Sunnyside coal, based upon prices for *unwashed* Raton coal, an adjustment must be made. The Government's own witness, Mr. Johnson, agreed that adjustments would have to be made as between washed and unwashed coal in order to get comparable prices, that these adjustments would make a substantial difference, that they would consist in the washing costs and a percentage for the washing loss, and that all in all this might make around a dollar's difference (Tr. 1017-1020) in favor of the Sunnyside Coal.

The testimony is uncontradicted that it is a recognized commercial practice to pay more for coal with a lower ash content and that differences in ash content are definitely recognized in pricing coal. (Heers, Tr. 87; Keenan, Tr. 268, 271, 291; Heiner, Tr. 351-352). The testimony is that the price adjustment ranges from 10¢ per unit of ash up to 30¢ to 40¢ per unit of ash. The ash content of the Sunnyside coal in a washed condition was 7.1% in 1949 and 6.8% in 1950. (Finding No. 59, R. 46). The ash content of the Raton coal was 11.8% in 1949 and 12.3% in 1950. (Finding No. 66, R. 49). In order to arrive at a representative market price for the Sunnyside coal based upon the sales prices of

the Raton coal, an adjustment in accordance with the recognized commercial practice is required. This is the same type of adjustment made in all of the iron ore markets of the world in adjusting price as the iron (Fe) content increases or decreases.

The principle of using regularly established commercial price adjustments is enunciated in the *Henderson Clay Products* case, *supra*. In that case, the Court observed (at p. 11-12) that any comparison of minerals should be on such a basis that "they are substantially equivalent by commercial standards," and that "physical, chemical and geological differences have importance only if they give rise to differences in commercial competition." (324 F.2d at 11). The District Court affirmed this rule in Conclusion of Law No. 6 (R. 52). It is undisputed in this record that differences in ash content do give rise to price differences in commercial competition and that washing costs and losses likewise give rise to price differences.

The attached Appendix G reflects the computation which has been made in order to give effect to these recognized commercial price adjustments. The starting point is the price paid by Colorado Fuel and Iron for the *unwashed* Raton coal. We are, of course, seeking to arrive at a representative market price to be used for washed Sunnyside coal. The first adjustment therefore gives effect to the loss of tonnage which is suffered in the course of washing process in order to make the comparison one which is "substantially equivalent by commercial standards." To this we then add washing costs since this is clearly an ordinary treatment process which can be taken into account in connection with a depletion price. Finally, the price is adjusted to reflect the regularly established commercial price adjust-

ment because of the lower "inherent ash" of the Sunnyside coal. The result is a representative market price of \$6.585 in 1949 and \$6.933 in 1950.¹⁵

These are the prices which should be used as the representative market price for the Sunnyside coal. By way of comparison, the representative market price adopted in this case by the District Court was \$4.75 for 1949 and \$4.87 for 1950. (Finding No. 52, R. 45).

Finding No. 69 (R. 50) suggests there are commercially accepted adjustments which are made for sulphur and plasticity. This, however, is not supported by the record. As to plasticity, the testimony is that differences in plasticity do not result in any penalty and that the benefits or detriments are not recognized in price (Heers, Tr. 158-159; Keenan, Tr. 290; Johnson, Tr. 997; Tr. 1012, lines 21-25). While sulphur is, of course, a detriment in coal, this is only the case if it exists in sufficient quantities in the resultant coke so that it becomes troublesome in the blast furnace process. At least in western practice, sulphur content under 1% is of no concern. (Keenan, Tr. 273).

d. Oklahoma-Arkansas Coking Coal

In making coke for use in the steel-making processes in the West, the uniform practice of all steel producers, including Kaiser, Columbia-Geneva and Colorado Fuel and Iron, is to blend together a large portion of high volatile coal with a small portion of low volatile coal to arrive at

15. Insofar as ash adjustment is concerned, the computation could be made by using an average of the dollar and cents per point of difference of ash, to which the witnesses testified. This average would be 35¢. It is quite obvious that this would substantially increase the representative market price. For example, in 1949, there was a 4.7% ash difference. We have, therefore, adopted the more conservative method of adjusting for the difference in ash on a simple ratio basis.

a coke of optimum strength at the most economic cost. The reason for this is that neither high volatile coal nor low volatile coal can be used alone in making a satisfactory coke. (Findings 60 and 61, R. 46-47). The low volatile coals purchased by each of the three steel producers come from mines in the Oklahoma-Arkansas region of the United States. (Finding No. 62, R. 47).

The volumes of low volatile coal purchased by all of these consumers were considerable. For the tax year July 1, 1948-June 30, 1949, they were 372,425 net tons, and in the tax year July 1, 1949-June 30, 1950, they were 482,252 net tons. (Exhibit 19, page 2).

The existence of a completely representative market with regard to this coking coal is clearly evidenced by the fact that purchases and sales at arm's length took place between a number of producers and a number of consumers, as reflected in Exhibits 19 and 28. The market consisted of independent buyers and independent sellers. There also can be no question but that these transactions took place in the same market area as that served by Raton Coal Company and the Sunnyside mines since the same consumers were buying this coal as were using the high volatile coal produced from the Sunnyside and Raton mines.

While it is true, as the Court has found, that the Oklahoma-Arkansas coals could not be used as a complete substitute for the Sunnyside coal in the coke-making process, it is equally true, as the District Court has found, that both of these coals were required in order to make a satisfactory coke, with the good points of one supplementing the good points of the other. Both of them are used for the same identical purpose. If these factors are to be recognized, it seems completely logical to compute an alternative representative market price based upon a weighted average of

the adjusted Raton prices as reflected in Appendix G for the Sunnyside coal produced by Kaiser and the Oklahoma-Arkansas prices for the Oklahoma-Arkansas coal purchased by Kaiser. Such a computation is attached as Appendix H and indicates a price of \$6.63 for the tax year ended 1949 and \$6.86 for the tax year ended 1950. This constitutes an alternative representative market price to be used for the Sunnyside coal.

E. CONCLUSION

We have tried to review fairly the largely uncontroverted facts in this case. We are intensely aware that the key issue in this case is the determination of a "representative market or field price", which is a factual question. We submit that in determining this question all of the facts surrounding each of the transactions must be considered and that this lack of consideration is the basic error in the decision of the District Court and in the proposed Findings and Conclusions of Law submitted by the Government in this case to the District Court (R. 119-144), which the District Court used in substantially verbatim form as its own Findings and Conclusions.

To us it is clear that these sales transactions relied upon by the District Court for the purpose of establishing a representative market price, when viewed in light of all of the circumstances surrounding those transactions, are not the result of competitive transactions and therefore must be disregarded. Each of them were sales of an exceptional, nominal, unusual, tie-in or accommodation nature. The extraordinary economic conditions surrounding the ore sales by Utah Construction Company and the coal sales by Utah Fuel Company are readily apparent. The nominal tie-in and accommodation nature of the coal transactions

by Kaiser Steel Corporation are equally apparent. The principles enunciated in the decided cases and in the Commissioner's regulations require that these sales be disregarded.

No one can dispute that the Lower Lake Port ore market establishes a truly representative market price. The evidence clearly supports the use of the prices established at this market in fixing a representative market price for Kaiser's iron ore. The interconnection and interdependence between the eastern and western markets has been clearly established and is not disputed. The representative market price for Kaiser's iron ore should be computed in the manner set forth in the attached Appendix F.

As a separate point, and regardless of what opinion anyone may have as to which transactions are to be used for the establishment of a "representative market or field price," the failure to recognize the freight differentials in the case of Kaiser's iron ore as a function of representative market price is obvious error. Likewise, any use of transactions other than those bearing some indicia of competitive transactions, such as the Long Beach, California export sales, cannot be justified.

The validity of the coal transactions between Raton Coal Company and Colorado Fuel and Iron Corporation as establishing a representative market price is made clear by the District Court's own Findings. These sales competed in the same market as served by Kaiser's Sunnyside mine. The price adjustments for washing cost and loss and for ash content are recognized adjustments made in the commercial market. There is no dispute in the record on this score. Accordingly, the representative market price for Kaiser's Sunnyside coal should be established in the manner set forth in the attached Appendix G. In the alternative,

these representative market prices should be established on the basis of a weighted average including transactions in the recognized Oklahoma-Arkansas market as set forth in the attached Appendix H.

It is respectfully submitted that this case should be reversed and remanded to the trial court with instructions that plaintiff's depletion allowance shall be computed on the basis of representative market prices established in accordance with these principles and that judgment should be entered in favor of plaintiff for the amount so computed.

Dated: February 9, 1968

GEORGE E. LINK
EDWARD J. RUFF
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By EDWARD J. RUFF
Attorneys for Appellant

F. CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD J. RUFF
Attorney

(Appendices follow)

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(A) IN GENERAL.—The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, bauxite, fluorspar, flake graphite, vermiculite, beryl, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball, sagger, and china clay, phosphate rock, rock asphalt, mines, trona, bentonite, gilsonite, thenardite (from brines or mixtures of brine), and potash mines or deposits, 15 per centum, and in the case of sulfur mines or deposits, 23 per centum, of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph.

(B) DEFINITION OF GROSS INCOME FROM PROPERTY.—As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining", as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term "ordinary treatment processes", as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulfur—pumping to vats, cooling, breaking, and loading

for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores. The principles of this subparagraph shall also be applicable in determining gross income attributable to mining for the purposes of sections 731 and 735.

Appendix C**Regulations 111, Section 29.23(m)-1**

In the case of a crude mineral product other than oil and gas, "gross income from the property", as used in section 114(b)(4)(A) means the gross income from mining. The term "mining" as used herein includes not only the extraction of ores or minerals from the ground but also the ordinary treatment processes which are normally applied by the mine owners or operators to the crude mineral product after extraction in order to obtain the commercially marketable mineral product or products.

If the taxpayer sells the crude mineral product of the property in the immediate vicinity of the mine, "gross income from the property" means the amount for which such product was sold, but if the product is transported or processed (other than by the ordinary treatment processes described below) before sale, "gross income from the property" means the representative market or field price (as of the date of sale) of a mineral product of like kind and grade as beneficiated by the ordinary treatment processes actually applied, before transportation of such product. If there is no such representative market or field price (as of the date of sale) then there shall be used in lieu thereof the representative market or field price of the first marketable product resulting from any process or processes (or, if the product in its crude mineral state is merely transported, the price for which sold) minus the costs and proportionate profits attributable to the transportation and the processes beyond the ordinary treatment processes. If the taxpayer establishes to the satisfaction of the Commissioner that another method of computation, other than the computation of profits proportionate to costs, clearly reflects the gross income from the property, then such gross income shall be computed by the use of such other method.

Appendix D

**Regulations Proposed on November 3, 1956,
21 Federal Register 8439, 8450**

Regs. Section 1.613-3(b) and (c)

(b) *Gross income from mining.* (1) The term "gross income from the property", as used in section 613(c)(1), means, in the case of a property (other than an oil or gas property), gross income from mining. For the purposes of this paragraph, transportation which qualifies as "mining" will be referred to as "mining transportation" and transportation which does not qualify as "mining" will be referred to as "non-mining transportation". (See § 1.613-3(c)(7) for definition of the term "mining".)

(2) "Gross income from mining" is the portion of the taxpayer's gross income which is attributable to the extraction of the minerals from the mine, the application to the crude mineral product (see § 1.613-3(c)(1)) of ordinary treatment processes (see § 1.613-3(d)) and mining transportation.

(3) Examples of the application of the rule described in subparagraph (2) follow:

(i) If a taxpayer sells

(a) The crude mineral product without any transportation costs having been incurred, or

(b) The processed mineral product (see § 1.613-3(c)(2)) without any transportation costs having been incurred, or

(c) The processed mineral product as to which only mining transportation costs have been incurred,

"gross income from mining" means the amount for which such mineral product was sold.

(ii) If a taxpayer sells

(a) The crude mineral product as to which transportation costs have been incurred, or

(b) The manufactured product (see § 1.613-3(c)(3)) as to which no ordinary treatment processes were applied and no transportation costs were incurred, or

(c) The manufactured product as to which no ordinary treatment processes were applied and transportation costs were incurred,

"gross income from mining" means the market price (as of the date of the sale of the mineral product referred to in (a) and the manufactured products in (b) and (c) of this subdivision) of the untransported crude mineral product referred to in (a) of this subdivision, or the untransported crude mineral product used to produce the manufactured products referred in (b) and (c) of this subdivision.

(iii) If a taxpayer sells

(a) The processed mineral product as to which only non-mining transportation costs have been incurred, or

(b) The processed mineral product as to which both mining and non-mining transportation costs have been incurred, or

(c) The manufactured product as to which ordinary treatment processes have been applied and no transportation costs have been incurred, or

(d) The manufactured product as to which ordinary treatment processes have been applied and only mining transportation costs have been incurred, or

(e) The manufactured product as to which ordinary treatment processes have been applied and only non-mining transportation costs have been incurred, or

(f) The manufactured product as to which ordinary treatment processes have been applied and both mining and non-mining transportation costs have been incurred,

"gross income from mining" means the market price (as of the date of sale of the products referred to in (a) through

(f), of this subdivision) of a processed mineral product obtained by applying to the crude mineral product the ordinary treatment processes actually applied and mining transportation costs actually incurred by the taxpayer to produce the particular mineral product described in (a), (b), (c), (d), (e) and (f) of this subdivision.

(4) The mineral product to which the market price (referred to in subdivision (ii) and (iii) of subparagraph (3)) is applied is designated, herein, as the "gross income product". For the purpose of this paragraph the term "market price" means the price (as of the date the taxpayer actually sells his crude mineral product or processed mineral product or manufactured product, as the case may be) at which the gross income product is sold commercially in the vicinity of the taxpayer's mine. However, in no case shall the market price of the gross income product exceed the amount actually realized from the gross income product. If there are no such commercial sales in such area, then the market price of the gross income product (as of the date the taxpayer sells his crude mineral product or processed mineral product or manufactured product as the case may be) must be determined by the use of other appropriate methods with the objective of determining as accurately as practicable the price at which such gross income product would be sold if such commercial sales existed. Among such methods that may be appropriate, depending on the circumstances of each individual case, are the following:

(i) Comparison with the prices at which crude mineral products or processed mineral products similar to the taxpayer's gross income product are sold commercially in the vicinity of the taxpayer's mine with proper adjustment being made for material differences, if any, between the taxpayer's gross income product and the products sold com-

mercially (such as differences in kind or grade or mineral content or ordinary treatment processes involved or transportation costs between mine and market or relative volume of sales).

(ii) Comparison with the prices at which crude mineral products or processed mineral products identical or similar to the taxpayer's gross income product are sold commercially in other areas, with proper adjustments being made for material differences, if any, between the taxpayer's gross income product and the products sold commercially (such as differences in kind or grade or mineral content or ordinary treatment processes involved or transportation costs between mine and market or relative volume of sales).

(iii) Computation based on the taxpayer's cost of producing the gross income product plus a rate of profit (determined to be appropriate) per unit of product, per dollar of cost, or per dollar of investment in mining. Such rate of profit may be ascertained:

(a) By comparison with the rate of profit currently realized on commercial sales of identical or similar crude mineral products or processed mineral product, or

(b) By comparison with the rate of profit currently realized by the taxpayer on sales of his products, or

(c) By comparison with a rate of profit ascertained by any other appropriate method.

In utilizing comparative prices for the determination of market prices, greater weight should be given to prices (1) of commercial sales made closest in time to the sale of the mineral product by the taxpayer, (2) of mineral products most nearly similar to the gross income product of the taxpayer, and (3) of mineral products sold commercially in areas closest to the mines of the taxpayer. In utilizing the

taxpayer's costs of producing the gross income product in determining its market price, only costs actually incurred shall be taken into consideration. Such costs will usually be reflected on the books and records the taxpayer maintains for cost control and other ordinary business purposes. Certain deductions allowed for tax purposes in the nature of special incentives, such as that of accelerated amortization of emergency facilities under section 168, for exploration and development expenditures under sections 615(a), and 616(a), respectively, and similar deductions, would not ordinarily be taken into consideration in determining market prices as set out above.

(5) The rule with respect to manufactured products described in subparagraph (3) (ii)(b), and (c) and (iii) (c), (d), (e) and (f) and subparagraph (4) that the market price of the gross income product must be computed as of the date that such manufactured product is sold by the taxpayer shall not apply in cases where the taxpayer shows to the satisfaction of the Commissioner that it is impractical and unrealistic to require him to compute the market price of the gross income product as of the date he sells the end product. In such exceptional cases, the taxpayer may compute the market price as of the date he transports the gross income product from the premises of the mine to the manufacturing facilities. A taxpayer shall employ this method only so long as he can demonstrate his inability reasonably to compute the market price of his gross income product as of the date he sells the manufactured product and only to the extent that there results no distortion of the allowance for depletion. Any taxpayer employing this method must consistently compute cost depletion by using as the number of units of mineral sold, the same number of units used in the determination of the gross income product transported from the premises of the mine.

(6) To the return of a taxpayer computing gross income from mining under subparagraph (4) above, there shall be attached a statement describing the gross income product involved and the method or methods employed by the taxpayer in determining the market price of the gross income product. Such statement shall include:

(i) If comparative prices were used—

(a) The prices so used, and

(b) Any adjustments that were made because of differences between taxpayer's gross income product and the mineral product used for comparison.

(ii) If costs were used—

(a) The costs so used,

(b) The rate of profit applied,

(c) The method used in determining the rate of profit, and

(d) Any comparative rates of profits used and the reasons for their use.

(iii) If any other method or combination of methods were employed, complete details and computations involved in using these methods, and

(iv) Any additional data necessary for a complete understanding of the method or methods employed and the computations involved in determining the market price.

(e) *Definitions of terms applicable to gross income from mining.* Where used in section 613(c) and paragraphs (b) and (c) of this section, the term—

(1) "Crude mineral product" means the mineral in the form in which it emerges from the mine.

(2) "Processed mineral product" means the mineral product which is obtained by application to the crude mineral product of one or more of the ordinary treatment processes.

(3) "Manufactured product" means the product which is obtained by the application to the crude mineral product or processed mineral product of processes which are not ordinary treatment processes.

(4) "Mineral product" means the crude mineral product or processed mineral product.

(5) "Commercially marketable mineral product or products" means the mineral product or products sold by the taxpayer or used by him in his trade or business whether in the form of crude, or processed mineral product.

(6) "Mine owners or operators" refers to taxpayers who are engaged in mining as defined in subparagraph (7) below. Where a taxpayer both engages in mining and applies to the crude mineral product or processed mineral product processes other than ordinary treatment processes, he is a "mine owner or operator" with respect to the extraction of minerals from the mine and the application to such minerals of ordinary treatment processes, but with respect to the application of other than ordinary treatment processes he is a manufacturer. Thus, the term "mine owners or operators" in the term "ordinary treatment processes normally applied by mine owners or operators" refers to the taxpayer in his capacity as an operator of a mine and not in his capacity as a manufacturer.

(7) "Mining" includes not only the extraction of ores or minerals (other than oil and gas) from the ground but also the ordinary treatment processes which are normally applied by mine owners or operators to the crude mineral product after extraction to obtain the commercially marketable mineral product or products. The term "mining" also includes so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which

ordinary treatment processes are applied thereto as is not in excess of 50 miles, and, if the Commissioner finds that both the physical and other requirements are such that the ore or mineral must be transported a greater distance to such plants or mills, the transportation over such greater distance. (See paragraph (e) of this section for filing of application to treat transportation in excess of 50 miles as mining.)

(8) "Extraction of ores or minerals from the ground" means not only the extraction of ores or minerals from a deposit, but also the extraction by mine owners or operators of ores or minerals from waste or residue of prior mining. The preceding sentence does not apply to any such extraction of ores or minerals by the purchaser of such waste or residue or the purchaser of the rights to extract ores or minerals from such waste or residue. The term "purchaser" does not apply to any person who acquires mineral property, including such waste or residue, in a tax-free exchange, such as a corporate reorganization, from a person who was entitled to a depletion allowance upon ores or minerals produced from such waste or residue. The term "purchaser" also does not apply to a lessee, upon the renewal of a mineral lease without an intervening lapse, if the lessee was entitled to a depletion allowance upon ores or minerals produced from such waste or residue before renewal of the lease. It is not necessary, for purposes of the preceding sentence, that the mineral lease contain an option for renewal. The term "purchaser" does include a person who acquires such waste or residue in a taxable transaction, even though such waste or residue is acquired merely as an incidental part of the entire mineral enterprise. It is immaterial whether the waste or residue result from the process of extraction from the ground or from application of the

ordinary treatment processes provided for in § 1.613-3(d). However, extraction of ores or minerals from waste or residue which results from processes which are not allowable as ordinary treatment processes is not treated as mining. For special rules with respect to certain corporate acquisitions referred to in section 381(a), see section 381(c)(18) and the regulations thereunder.

Appendix E**Regulations Proposed on July 13, 1966,
31 Federal Register 9506****Regs. Section 1.613-3(b)-(d)**

(b) *Minerals other than oil and gas—(1) In general.* The term “gross income from the property,” as used in section 613(c)(1), means, in the case of a mineral property other than an oil or gas property, gross income from mining. “Gross income from mining” is that amount of income which is attributable to the processes of extraction of the ores or minerals from the ground, the application of mining treatment processes, and transportation which qualifies as “mining.” For the purpose of this section, “ordinary treatment processes” (applicable to the taxable years beginning before January 1, 1961) and “treatment processes considered as mining” (applicable to the taxable years beginning after December 31, 1960) will be referred to as “mining treatment processes.” Processes and transportation which do not qualify as mining will be sometimes referred to as nonmining processes. Also for the purpose of this section, transportation which qualifies as “mining” will be referred to as “mining transportation” and transportation which does not qualify as “mining” will be referred to as “non-mining transportation.” See paragraph (f)(1) of this section for the definition of the term “mining.”

(2) *Sales prior to the application of nonmining processes and nonmining transportation—(i) Subject to the provisions of subdivision (ii) of this subparagraph and the adjustments required by paragraph (e) of this section, “gross income from mining” means the amount for which the ore or mineral is sold if the taxpayer sells the ore or mineral—*

(a) As it emerges from the mine, prior to the application of any process other than a mining treatment process or any transportation,

(b) After the application of only mining treatment processes, and prior to any transportation, or

(c) After application of only mining treatment processes, and after only mining transportation.

(ii) Subdivision (i) of this subparagraph shall not apply in any case where the price for which the ore or mineral is sold is established by means of a violation of the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. 209, 15 U. S. C. 1-7, as amended, or by means of a violation of a similar State or Federal law. In case the price is so established, "gross income from mining" shall be determined in accordance with paragraph (c) of this section, if it is possible to ascertain a representative market or field price for the taxpayer's ore or mineral; if it is impossible to ascertain a representative market or field price, there shall be used such evidence of a fair market price for the taxpayer's ore or mineral as may be available. Unless it has been determined by the final judgment of a court of competent jurisdiction or it is alleged in a criminal or civil proceeding instituted by a Federal, State, or local government, or an agency thereof, that the price for which the ore or mineral is sold was established by such a violation, for purposes of this subparagraph it shall be deemed that the price is not so established.

(c) *Sales after the application of nonmining processes or nonmining transportation where a representative market or field price for the taxpayer's ore or mineral can be ascertained—(1) General rule.* If the taxpayer processes or transports the ore or mineral before sale (other than by mining treatment processes or mining transportation), "gross income from mining" means the representative market or field price of an ore or mineral of like kind and grade

as the taxpayer's ore or mineral after the application of only the mining treatment processes actually applied and before any nonmining transportation, subject to any adjustments required by paragraph (e) of this section. If it is possible to determine a representative market or field price under the provisions of this paragraph, the taxpayer's "gross income from mining" shall be determined on the basis of such price rather than under the provisions of paragraph (d) of this section.

(2) *Criteria for determining whether an ore or mineral is of like kind and grade as the taxpayer's ore or mineral.* An ore or mineral will be considered to be of like kind and grade as the taxpayer's ore or mineral if, in common commercial practice, it is regarded as sufficiently similar in chemical or physical characteristics to the taxpayer's ore or mineral that it is used or is economically suitable for use for essentially the same purpose as the use to which the taxpayer's ore or mineral is put. In determining whether an ore or mineral is of like kind and grade as the taxpayer's, an ore or mineral will be considered to be of like kind and grade as the taxpayer's ore or mineral even though the chemical or physical characteristics (including size) of such ore or mineral are not precisely identical to those of the taxpayer's ore or mineral. For example, in the case of a taxpayer who mines and uses his bituminous coal in the production of coke, all bituminous coals having coking quality suitable for commercial use by coke producers are considered to be of like kind and grade as the coal mined and used by the taxpayer. Similarly, the fact that the taxpayer applies slightly different size reduction processes or applies slightly different beneficiation processes than are applied to an ore or mineral which meets the standard of the first sentence of this subparagraph will not, in itself, prevent such ore or mineral from being considered to be of

like kind and grade as the taxpayer's ore or mineral. On the other hand, the fact that two ores or minerals are suitable for the same general commercial use will not cause the two ores or minerals to be considered to be of like kind and grade if the desirable constituents of the two ores or minerals are markedly different substances. For example bauxite will not be considered to be of like kind and grade as iron ore merely because the final products manufactured from these ores are used for a common purpose, *i.e.*, structural uses. Similarly, coal will not be considered to be of like kind and grade as natural gas merely because both coal and natural gas may be used as fuel.

(3) *Factors to be considered in determining the representative market or field price for the taxpayer's ore or mineral.* In determining the representative market or field price for the taxpayer's ore or mineral, consideration shall be given only to prices of ores or minerals of like kind and grade as the taxpayer's ore or mineral and with which, under commercially accepted standards, the taxpayer's ore or mineral would be considered to be in competition if it were sold under the conditions described in paragraph (b)(2)(i) of this section. As among such prices primary consideration shall be given to prices for sales during the taxable year (with appropriate adjustment in the event of price changes within such taxable year) of ores or minerals:

- (i) Most similar, after the application of mining treatment processes, to the taxpayer's ore or mineral, and
- (ii) Produced from mines closest to the mine of the taxpayer. In the event that the individual criteria listed above each tend to support different prices, the determination of which of the two criteria should be accorded the greater importance will depend on the facts and circumstances of the individual case. A weighted average of the selling price of ores or minerals of like kind and grade as the taxpayer's,

beneficiated only by mining treatment processes, in the marketing area of the taxpayer's mine, although not a prerequisite to the determination of the representative market or field price, may assist in the determination of such price. The identity of the relevant market, and the price within such market which is the representative market or field price, are necessarily factual determinations to be made on the basis of the facts and circumstances of each individual case.

(4) *Type of sales which may be considered in determining the representative market or field price for the taxpayer's ore or mineral.* Sales of ores or minerals of like kind and grade as the taxpayer's will be taken into consideration in determining the representative market or field price for the taxpayer's ore or mineral only if such sales are the result of competitive transactions. For the purpose of determining the representative market or field price for the taxpayer's ore or mineral, exceptional, nominal, unusual, tie-in, or accommodation sales shall be disregarded.

(5) *Information to be furnished by a taxpayer computing gross income from mining by use of a representative market or field price.* A taxpayer who computes his gross income from mining pursuant to the provisions of this paragraph shall attach to his return a statement indicating the price or prices used by him in computing the representative market or field price for his ore or mineral and the source of his information as to such price or prices.

(6) *Limitation on gross income from mining computed under the provisions of this paragraph.* No price shall be considered a representative market or field price for the taxpayer's ore or mineral if the sum of such price plus the costs of the nonmining processes which the taxpayer applies to his ore or mineral exceed the taxpayer's actual sales price of the product sold. For example, if the costs of non-

mining processes applied by the taxpayer to coal for the purpose of making coke are \$12 per ton, and the taxpayer's actual sale price for such coke is \$18 per ton, a price of \$7 per ton would not be a representative market or field price for the taxpayer's coal.

(d) *Sales after the application of nonmining processes where a representative market or field price for the taxpayer's ore or mineral cannot be ascertained—(1) General rule.* (i) If it is impossible to determine a representative market or field price as described in paragraph (c)(1) of this section, then, except as provided in subparagraph (2) of this paragraph, there shall be used the representative market or field price of the first marketable product, minus the sum of—

(a) The direct and indirect costs allocable to nonmining processes and

(b) The proportionate profits attributable to such processes, and subject to any adjustments required by paragraph (e) of this section. See § 1.611-0.

(ii) The proportionate profits attributable to nonmining processes are determined by multiplying the profit described in subdivision (iii) of this subparagraph by a fraction whose numerator is the sum of the direct and indirect costs paid or incurred by the taxpayer and allocable to nonmining processes and whose denominator is the sum of all costs, direct and indirect, paid or incurred by the taxpayer to produce, sell, and transport such first marketable product.

(iii) The profit referred to in subdivision (ii) of this subparagraph is the difference between the representative market or field price of the first marketable product and the taxpayer's total costs (direct and indirect) paid or incurred to produce, sell, and transport such product.

(iv) In determining the amount of the indirect costs allocable to nonmining processes, all of the indirect costs which

are paid or incurred by the taxpayer to produce, sell, and transport the first marketable product shall be fairly apportioned between mining and nonmining.

(2) *Computation of gross income from mining by use of a method other than the proportionate profits method*—(i) If, for taxable years beginning more than 90 days after the publication of this paragraph of § 1.613-3 of the Income Tax Regulations in the Federal Register as a Treasury decision, circumstances exist which, in the taxpayer's opinion, make the use of the proportionate profits method inappropriate in his case, the provisions of subdivision (ii) or (iii) of this subparagraph are applicable in computing gross income from mining by use of another method. Such alternative method shall be acceptable only if the taxpayer establishes to the satisfaction of the district director (in the case of a method used pursuant to subdivision (ii) of this subparagraph) or of the Commissioner (in the case of a request made pursuant to subdivision (iii) of this subparagraph) that the proportionate profits method does not clearly reflect gross income from the property, and the proposed alternative method clearly reflects gross income from the property.

(ii) Except as provided in subdivision (iii) of this subparagraph, if a taxpayer uses a method other than the proportionate profits method the taxpayer shall file, with his income tax return for the first taxable year beginning more than 90 days after the publication of this paragraph of § 1.613-3 of the Income Tax Regulations in the Federal Register as a Treasury decision for which use of such other method is desired, a statement containing the following information:

(a) An explanation of the circumstances which make it impossible to ascertain a representative market or field price for the taxpayer's ore or mineral;

- (b) A concise statement of the reasons why the computation of gross income from mining is not clearly reflected by the use of the proportionate profits method;
- (c) A description of the method or methods used by the taxpayer to compute his gross income from mining during the previous taxable years to which the Internal Revenue Code of 1954 is applicable;
- (d) A concise description of the method the taxpayer proposes to use in lieu of the proportionate profits method; and
- (e) Computations of the taxpayer's gross income from mining for the taxable year for which such alternative method is used, and for either of the two taxable years immediately preceding such taxable year, by use of—
 - (1) The proportionate profits method, and
 - (2) Such alternative method, had it been used for such years.

The district director may require such other information as may be necessary in order to determine whether adoption or continued use of the alternative method will be permitted. Whether or not the taxpayer's use of such method should be permitted and whether or not the use of such method may be continued, and the propriety of all computations incidental to the use of such method, will be determined by the district director in connection with the examination of the taxpayer's income tax returns. Such method, once adopted, shall continue to be used in all subsequent taxable years for which it is necessary to compute gross income from mining in accordance with the provisions of this paragraph, unless the use of a different method is (a) required by the district director, or (b) authorized by the Commissioner upon written request filed in the manner prescribed by subdivision (iii) of this subparagraph.

(iii) In lieu of following the procedure set forth in subdivision (ii) of this subparagraph, the taxpayer may submit a request to the Commissioner of Internal Revenue, Washington, D. C. 20224, within 90 days after the beginning of the first taxable year beginning more than 90 days after the publication of this paragraph of § 1.613-3 of the Income Tax Regulations in the Federal Register as a Treasury decision for which the taxpayer desires to use such other method. Such request must contain the same information required by subdivision (ii) of this subparagraph, except that the computations required by subdivision (ii) (e) shall be made for any two of the three taxable years immediately preceding the year for which application is made. The Commissioner may require such other information as may be necessary in order to determine whether adoption of the proposed method will be permitted. Once approved, such method shall continue to be used in lieu of the proportionate profits method in the absence of (a) the approval of the Commissioner for the adoption of another method upon written request therefor, or (b) a material change in the taxpayer's operations or other material facts that requires, in the opinion of the Commissioner, that a different method be utilized in order clearly to reflect the taxpayer's gross income from the property.

(iv) For taxable years subsequent to the first taxable year to which the provisions of subdivision (ii) or (iii) of this subparagraph apply the taxpayer shall attach to his income tax returns for such subsequent taxable years a statement indicating whether gross income from mining has been computed by a method other than the proportionate profits method and, (a) whether, if a method was used to which subdivision (ii) applies, such method was permitted in the examination of the taxpayer's return for prior taxable years, or (b) if a request submitted pursuant to the

provisions of subdivision (iii) of this subparagraph has been approved by the Commissioner, the date such approval was granted.

(v) Subdivisions (i) through (iv) of this subparagraph shall not apply with respect to taxable years beginning before the 91st day following the publication of this paragraph of § 1.613-3 of the Income Tax Regulations in the Federal Register as a Treasury decision. In the case of taxable years beginning before such date, if the taxpayer establishes to the satisfaction of the Commissioner that another method of computation, other than the computation of profits proportionate to costs, clearly reflects gross income from the property, then such gross income shall be computed by the use of such other method.

(3) *Costs to be used in computing gross income from mining by use of the proportionate profits method or another method based on the taxpayer's costs.* The objective of the proportionate profits method is to determine what portion of the sale price of the taxpayer's product is attributable to mining, and what portion to nonmining operations, through application of the assumption that each dollar of cost (both direct and indirect) paid or incurred to produce, sell, and transport the mineral earns the same percentage of profit. In determining the taxpayer's gross income from mining by use of the proportionate profits method or another method based on the taxpayer's costs, only costs actually incurred shall be taken into consideration. Such costs will usually be reflected on the books and records which the taxpayer maintains for cost control and other ordinary business purposes, including such internal records as may be maintained for management purposes. In general, if the taxpayer has employed in a consistent manner a method of determining the direct costs of the various individual phases of his activities (such as loading for ship-

ment, calcining, extraction, etc.) which is reasonable, does not result in the allocation of nonmining costs to mining treatment processes, or vice versa, and is in keeping with sound accounting practice, such method shall not be disturbed. In cases where the taxpayer maintains different cost records for tax purposes and for non-tax purposes, the cost or other accounting records maintained for non-tax purposes, if reasonable and maintained in keeping with sound accounting practice, shall be used in determining mining and nonmining costs provided that their use does not result in the allocation of nonmining costs to mining treatment processes, or vice versa. For example, even though a taxpayer elects to take a deduction for amortization of emergency facilities for the taxable year under section 168, he shall, in computing his "gross income from mining" under a method which utilizes the taxpayer's costs, substitute for the amount deducted for amortization of emergency facilities a figure which represents a reasonable deduction for depreciation based on the useful life of the assets. If only a portion of the property is subject to amortization under section 168, then the deduction shall be determined without regard to section 168. Similarly, if exploration or development costs are deducted in the year paid or incurred under section 615(a) or section 616(a), the taxpayer shall, nevertheless, in computing his "gross income from mining" for the taxable year under a method which utilizes his costs in determining such constructive income, take into account as costs the amount which would have been deductible for such taxable year if they had been deferred in accordance with section 615(b) or section 616(b). Furthermore, the charges for depreciation which the taxpayer maintains for ordinary business purposes, where reasonable and in keeping with sound accounting practice,

shall be used in lieu of depreciation allowances under accelerated methods permitted as tax deductions.

(4) *Treatment of particular items in computing gross income from mining by use of the proportionate profits method or another method based on the taxpayer's costs—*

(i) In determining gross income from mining by use of the proportionate profits method or any other method which is based on the taxpayer's costs, the costs and profits attributable to "mining transportation" shall be included, that is, so much of the transportation of ores and minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the mining treatment processes are applied thereto as is not in excess of 50 miles or, if the taxpayer files an application pursuant to paragraph (h) of this section and the Commissioner finds that both the physical and other requirements are such that the ores or minerals must be transported a greater distance to such plants or mills, the transportation over the greater distance. Where such plants or mills are in excess of 50 miles (or of such greater distance approved by the Commissioner) from the point of extraction from the ground, then costs incurred for transportation in excess of 50 miles (or of such greater distance) to the treatment plant shall be treated as "nonmining" costs in determining "gross income from mining." Accordingly, all profits attributable to such excess transportation are treated as nonmining profits. See also paragraph (g)(3) of this section, relating to transportation the primary purpose of which is marketing or distribution. In the absence of other methods which the district director determines will clearly reflect the costs of the various phases of transportation, the costs attributable to such excess transportation shall be an amount which is in the same ratio to the costs incurred for the total transportation to the treatment plant as the distance of the excess

transportation is to the distance of the total transportation.

(ii) In determining "gross income from mining" by use of the proportionate profits method or any other approved method which is based on the taxpayer's costs, a process shall not be considered as a mining treatment process to the extent it is applied to ores, minerals, or other materials with respect to which the taxpayer is not entitled to a deduction for depletion under section 611. The costs of such nondepletable ores, minerals, or materials; the costs of the processes (including blending, size reduction, drying, etc.) applied thereto; and the transportation costs thereof, if any, shall be considered as nonmining costs in determining "gross income from mining." If a mining treatment process is applied to an admixture of depletable and nondepletable material, the cost of the process and the cost of transportation, if any, attributable to the nondepletable material shall be considered as nonmining costs in determining "gross income from mining." Accordingly, all profits attributable thereto are treated as nonmining profits. In the absence of methods which will more clearly reflect the cost attributable to the processing and transportation, if any, of the nondepletable admixed material, the cost attributable thereto shall be deemed to be that proportion of the costs which the tonnage of nondepletable material bears to the total tonnage of both depletable and nondepletable material.

(iii) In determining "gross income from mining" by use of the proportionate profits method (or an alternative method which the district director approves and which is based on the taxpayer's costs), the costs attributable to containers, bags, packages, and similar items as well as the costs of materials and labor attributable to bagging, packaging, or similar operations shall be considered as nonmining costs. Accordingly, all profits attributable thereto are treated as nonmining profits.

Appendix F

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KAISER STEEL CORPORATION

**Computation of Weighted Average Representative
Market Price for Eagle Mountain Iron Ore and Vulcan Iron Ore
Years Ended June 30, 1949 and 1950**

Year Ended	Net Tons Shipped (Finding No. 15, R. 34)	Price per N.T. f.o.b. Mine*	Product (1) \times (2)	Weighted Average Price f.o.b. Mine (3) + (1)
6/30/49:				
Eagle Mountain ore mine				
7/1/48 - 12/31/48	74,611 N.T.	\$ 3.584	\$ 267,406	
1/1/49 - 6/30/49	202,044	4.371	883,134	
	<u>276,655 N.T.</u>		<u>\$1,150,540</u>	<u>\$4.159</u>
Vulcan ore mine				
7/1/48 - 12/31/48	113,914 N.T.	4.263	\$ 485,615	
1/1/49 - 6/30/49	54,056	4.912	265,523	
	<u>167,970 N.T.</u>		<u>\$ 751,138</u>	<u>\$4.472</u>
6/30/50:				
Eagle Mountain ore mine				
7/1/49 - 12/31/49	388,016 N.T.	4.903	\$1,902,442	
1/1/50 - 6/30/50	447,199	5.331	2,384,018	
	<u>835,215 N.T.</u>		<u>\$4,286,460</u>	<u>\$5.132</u>
Vulcan ore mine No shipments				

*See page 2 of this appendix F

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KAISER STEEL CORPORATION

**Computation of Representative Market Price for
Eagle Mountain Iron Ore and Vulcan Iron Ore
Years Ended June 30, 1949 and 1950**

	Price per Gross Ton at Lower Lake Ports				Price per Net Ton at Mine		
	Lake Superior Ore (1) —		KSC Ore		KSC Ore	Less Frt.	Price f.o.b. Mine
	Published Price	For Fe	Fe	Content (2)	Adjusted Price	KSC Mine to Fontana	
6/30/49:							
Eagle Mountain ore mine							
7/1/48 - 12/31/48	\$6.20	51.5%	54.02%	\$6.503	\$5.806	\$2.222(3)	\$3,584
1/1/49 - 6/30/49	7.20	51.5	52.82	7.384	6.593	2.222(3)	4,371
Vulcan ore mine							
7/1/48 - 12/31/48	6.20	51.5	53.23	6.408	5.721	1.458(4)	4,263
1/1/49 - 6/30/49	7.20	51.5	51.03	7.134	6.370	1.458(4)	4,912
6/30/50:							
Eagle Mountain ore mine							
7/1/49 - 12/31/49	7.20	51.5	53.20	7.438	6.641	1.738(3)	4,903
1/1/50 - 6/30/50	7.70	51.5	52.95	7.917	7.059	1.738(3)	5,331
Vulcan ore mine							
No shipments							

Notes: (1) Exhibit SS, 1950 edition, tables 14 and 15, pages 234-5, Mesabi Non-Bessemer ore.

(2) Exhibit AAA.

(3) Exhibit V.

Exhibit S, attached sheet 3 of 4.

Appendix G**KAISER STEEL CORPORATION****Computation of Representative Market Price for Sunnyside Coal by Reference to Sales Price of Koehler Coal from Raton Coal Company to CF & I**

	Year Ended	6/30/49	6/30/50
Sales price from Raton Coal Company to CF & I—unwashed/NT (Exhibit H)*		<u>\$5.240</u>	<u>\$5.333</u>
Divided by yield per CF & I of 87.39% and 84.81% after washing to arrive at mine price of coal in one ton of washed coal (Exhibit 36, Bertholf deposition, pages 24-5)		5.996	6.288
Add: Sunnyside washing costs per ton of washed coal (Frantz, Tr. 837)		.216	.196
Profit on washery operation—estimated (Frantz, Tr. 837)		.040	.040
Cost per net ton of washed coal at mine (the Sunnyside situation) with Raton ash		<u>\$6.252</u>	<u>\$6.524</u>
To adjust for differences in ash content as between Sunnyside coal and Raton Coal:			
Above prices divided by the ratio developed between the Raton average ash content of 11.8% and 12.3% (or 88.2% and 87.7% yield of pure coal) and Sunnyside average ash content of 7.1% and 6.8% (or 92.9% and 93.2% yield of pure coal) (Exhibit 16)			
Representative market price of Sunnyside coal		<u>\$6.585</u>	<u>\$6.933</u>

*Government Exhibit H shows that purchases of coking coal from Raton by CF & I during the calendar year 1949 amounted to 336,619 tons. The correct figure is 345,888 tons. See plaintiff's exhibit 28; Exhibit 34 (Dunn deposition) Ex. C, page 3; and Exhibit 36 (Bertholf deposition) page 26. The incorrect figure affects District Court Finding No. 64.

*Appendix H***Weighted Composite Average of Sunnyside
and Oklahoma-Arkansas Prices**

Price (Appendix G) Net Tons	Sunnyside (Finding No. 36, R. 41)	1949	Oklahoma-Arkansas (Ex. 29) Weighted Avg. Price	Net Tons
\$6.585.....	416,615	\$6.99	56,473(1)	
Weighted Average Price—6.63				
		1950		
\$6.933.....	591,568	\$6.26	65,845	
Weighted Average Price—\$6.86				

(1) Excluding inter-company transfer from Kaiser-Frazer Parts Corp. of 3,360 tons at \$10.00 per net ton.